Supreme Court, U.S.
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No. ——— 10-389

In the

Supreme Court of the United States

JOSE GUEVARA,

Petitioner,

v.

REPUBLICA DEL PERU, AND
MINISTERIO DEL INTERIOR DEL PERU,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The commercial activity exception to the Foreign Sovereign Immunities Act ("FSIA") identifies three grounds for which a sovereign's commercial activity will subject it to jurisdiction in U.S. courts. The third ground permits a party to overcome the statute's presumption of immunity based upon a sovereign's act performed in connection with commercial activity elsewhere which causes a "direct effect" in the United States. In *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992), this Court determined that an effect is "direct" if it follows "as an immediate consequence of the defendant's . . . activity." *Id.* at 618 (quoting *Weltover, Inc. v. Republic of Argentina*, 941 F.2d 145, 152 (2d Cir. 1991)) (ellipses in original). In so holding, this Court expressly rejected the notion that the commercial activity exception "contains any unexpressed requirement of 'substantiality' or 'foreseeability.'" *Id.*

Nevertheless, the circuits remain evenly split on what constitutes a "direct effect." While some circuits persist in requiring evidence that a "legally significant act" occurred in the United States, others reject that requirement as precluded by this Court's decision in *Weltover*. This conflict is deep, ongoing, and ripe for resolution. The question presented is especially important because the unique facts of this case highlight the important role that the FSIA and its commercial activity exception will play in transactions which impact our national security. Accordingly, the question presented is:

Whether the commercial activity exception's "direct effect" clause requires evidence that a "legally

significant act" occurred within the United States in order to vest American courts with jurisdiction over a foreign sovereign.

RULE 14.1(b) STATEMENT – PARTIES

The following were parties to the proceedings in the United States Court of Appeals for the Eleventh Circuit:

1. Jose Guevara – Plaintiff/Counter-Defendant/Appellee/Cross-Appellee, Petitioner on Review.

2. Republica del Peru – Defendant/Counter-Claimant/Cross-Appellant, Respondent on Review.

3. Ministerio del Interior del Peru – Defendant/Counter-Claimant/Cross-Appellant, Respondent on Review.

4. Antonio Ketin Vidal – Defendant/Counter-Claimant/Cross-Appellant.

5. Fernando Rospigliosi – Defendant/Counter-Claimant/Cross-Appellant.

6. Luis Alfredo Percovich – Proposed Intervenor/Appellant.

7. United States of America – *Amicus Curiae* in support of Defendant/Counter-Claimant/Cross-Appellant, Republica del Peru.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The United States Court of Appeals for the Eleventh Circuit has twice considered whether Respondents were immune from suit under the FSIA. The Eleventh Circuit's first decision, finding that the district court erred in dismissing the complaint because Respondents' offer of a monetary reward in exchange for information leading to the capture of an international fugitive fell within the FSIA's "commercial activity" exception, is reported at 468 F.3d 1289 (*Guevara I*). The district court's subsequent order granting summary judgment in favor of Petitioner is published at 2008 WL 4194839. The Eleventh Circuit's decision reversing summary judgment, on the ground that Respondents' offer of a monetary reward in exchange for information did *not* fall within the commercial activity exception, is reported at 608 F.3d 1297 (*Guevara II*).

JURISDICTION

The court of appeals entered its judgment on June 18, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The commercial activity exception to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2), provides that:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

STATEMENT OF THE CASE

The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602, *et seq.*, provides the "'sole basis' for obtaining jurisdiction over a foreign state in the United States." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 611 (1992) (quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989)). This case arises from the application of the commercial activity exception – the "most significant of the FSIA's exceptions." *Id.* The question presented recurs frequently and is often dispositive of a plaintiff's claims against a foreign sovereign. Moreover, this case presents an important gloss on the interplay between the commercial activity exception, the FSIA, and our national security in the context of a post-9/11 world, where reward offers are regularly made in exchange for sensitive information on the location of dangerous fugitives. Indeed, the extent to which the U.S. courts should play a role in enforcing reward offers made by

foreign states has exposed a rift between the Federal Bureau of Investigation and the U.S. Department of State. While the FBI supported Petitioner's claim below, the State Department urged the Eleventh Circuit to reverse for fear that relations between the two countries would be strained if the judgment was affirmed. All of these factors compel this Court's intervention.

1. "This case's facts read like the latest spy thriller." App. at 3a. Throughout the 1990s, Vladimiro Lenin Montesinos Torres advised former Peruvian President, Alberto Fujimori, and led Peru's National Intelligence System. *Id.* Montesinos abused the power of his office, committing various criminal acts, from arms trafficking, drug dealing, and money laundering, to extortion and murder. *Id.* His conduct earned him comparisons to Rasputin, Darth Vader, Torquemada, and Cardinal Richelieu. *Id.* at 48a. On the evening of September 14, 2000, a video aired on Peruvian national television showing Montesinos bribing a congressman-elect. *Id.* at 49a. Two days later, President Fujimori dissolved the national intelligence agency and announced that he would resign from office following new elections. *Id.* As the government collapsed, Montesinos boarded a yacht bound for the Galapagos Islands. *Id.* at 50a. In November, 2000, a special prosecutor in Peru issued warrants for Montesinos' arrest. *Id.* Peru's fugitive spy chief, however, had vanished. *Id.* To generate new leads, Interim President Valentin Paniagua Corazao issued Emergency Decree 049-2001, which established a five million dollar reward for accurate information directly leading to Montesinos' location and capture. *Id.* at 50a-51a.

Montesinos eventually resurfaced in Caracas, Venezuela, where he underwent facial reconstruction surgery to change his identity. *Id.* at 9a. In December, 2000, Petitioner Jose Guevara, a former Venezuelan intelligence officer, was introduced to a bandaged man in need of a safe house and security. *Id.* For the next seven months, Petitioner served Montesinos as both protector and emissary. *Id.* at 9a-10a. In late June, 2001, Petitioner traveled to Miami, Florida, to meet with a banker on Montesinos' behalf. *Id.* at 10a. Alerted to Petitioner's ties to Montesinos, the FBI tracked Petitioner to a hotel in downtown Miami and arrested him. *Id.* Once in custody, the FBI – at Respondents' direction – conveyed Respondents' $5 million reward offer for information leading to Montesinos' capture. *Id.* at 11a. Petitioner accepted.

The FBI alerted Peruvian and Venezuelan authorities who were working jointly to develop a plan to capture Montesinos based on Petitioner's information. *Id.* at 11a-12a. From Miami, Petitioner contacted Montesinos, as well as his associates, on multiple occasions. *Id.* These controlled calls were carefully orchestrated to facilitate Montesinos' capture. Petitioner initially contacted Montesinos to update the fugitive spy chief on his meeting with the Miami banker. *Id.* at 11a. On the following day, June 23, 2001, Petitioner made additional telephone calls from Miami to his associates in Venezuela to coordinate Montesinos' handover. *Id.* at 12a. Antonio Ketin Vidal Herrera, then Peru's Minister of the Interior, reiterated to the FBI that Petitioner would be paid the $5 million reward if he disclosed Montesinos' location in Caracas. *Id.* at 12a-13a. Within hours, Petitioner successfully coordinated Montesinos' handover. *Id.* at 13a. The next day, the FBI informed

Petitioner that Montesinos had been captured. *Id.* On June 25, 2001, the FBI released Petitioner from custody, and all charges against him were dismissed. *Id.*

2. From the time of Petitioner's arrest until the district court granted summary judgment, the FBI directly urged Respondents to pay Petitioner the promised reward. On October 29, 2001, Special Agent Kevin Currier wrote to the new Minister of the Interior, Fernando Rospigliosi, requesting that Respondents pay the reward they offered Petitioner. *Id.* at 80a-81a. In his communications with Respondents, Agent Currier confirmed that Petitioner satisfied the conditions of the reward: "Mr. Guevara provided the key information that led to the location and capture of fugitive Vladimiro Montesinos." *Id.* at 81a. On October 30, 2002, Agent Currier again wrote to Peru's Minister of the Interior, by then, Gino Costa, requesting that Respondents honor their promise to pay Petitioner the reward. *Id.* at 82a-83a. In his letter, Agent Currier noted that his request that Petitioner be paid constituted "the FBI's official response relating to the reward." *Id.* at 82a. Agent Currier concluded by reaffirming Petitioner's "key contributions which led to the location and capture of Montesinos." *Id.* at 83a.

3. Despite Petitioner's principal role in Montesinos' location and capture, Respondents refused to pay the reward. Unable to reach a resolution, Petitioner sued Respondents in a Florida State court.[1] *Id.* at 52a.

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[1] The original lawsuit also named, as individual defendants, Peru's former Ministers of the Interior, Antonio Ketin Vidal and Fernando Rospigliosi. The district court granted summary

Respondents removed the action to federal court pursuant to the FSIA, and the district court dismissed the action on sovereign immunity grounds. *Id.* at 52a-53a. On appeal, the Eleventh Circuit reversed, concluding that a foreign state's offer of a reward in return for information enabling it to locate and capture a fugitive falls within the FSIA's commercial activity exception: "When it issued the offer contained in the Emergency Decree, Peru entered the marketplace of information. It did so not as a regulator but as a purchaser in the manner available to any private individual, and that makes its actions commercial." *Id.* at 72a. In addition to being legally correct, the Eleventh Circuit concluded that its decision was also consistent with sound public policy:

> Accepting Peru's position, dressed though it is in the clothing of sovereignty, would frustrate rather than further the ability of countries to carry out their sovereign functions. Anything that makes it easier for countries to welch on their promises to pay for information decreases the real value of any reward they offer and makes it less likely that an offer will be accepted. As Guevara has learned up to this point in the litigation, the promise of a multimillion dollar reward means little or nothing to an informant if the country offering the reward cannot be made to pay it. The holding Peru asks us to reach would jeopardize not only its vital interests but those of every

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judgment in their favor, and they are not part of this case. *See* App. at 8a n.9.

> country that offers rewards for information, including this country.

Id. at 72a-73a.

4. On remand, the district court entered summary judgment in Petitioner's favor. In its ruling, the district court noted that "[t]he parties agree that Peru's offer of a reward in exchange for information was an offer to enter into a unilateral contract. . . . The only consideration necessary in a unilateral contract," the district court explained, "is the offeree's performance." *Id.* at 39a. Thus, concluded the court, "[o]nce the offeree performs, the offeree has accepted the offer, thereby creating a contract that binds the offeror." *Id.* Noting that "Peru's Emergency Decree No. 049-2001 offered a reward of $5,000,000.00 for information enabling the location and capture of Montesinos," the district court reasoned that "[a]ll that remained for completion of the contract was for someone to perform the terms of the offer by providing such information." *Id.* The district court ultimately concluded that Petitioner "provided the information and assistance that led to Montesinos's capture and arrest by Venezuelan authorities the evening of June 23, 2001." *Id.* at 41a. Respondents appealed.

5. A divided Eleventh Circuit reversed. Writing for the majority, Judge Tjoflat began with the proposition that the prior panel decision had not fully disposed of the immunity question. *Id.* at 15a. The majority explained that its prior decision only addressed "whether Peru's offer of a reward was a commercial activity . . . ." *Id.* at 17a. According to the majority, this partial resolution left open, "albeit implicitly," the question of subject matter jurisdiction. *Id.* Judge

Tjoflat explained that the district court failed to analyze whether Respondents' activity fell under any of the independent bases for jurisdiction under the commercial activity exception. *Id.* at 19a. Having found the district court's analysis incomplete, the appellate court took up the question.

The majority initially determined that Respondents' commercial offer did not satisfy the first two prongs of the commercial activity exception. *Id.* at 20a-23a. With respect to the third basis for jurisdiction – the subject of the circuit split at issue here – Judge Tjoflat framed the question presented as "was the effect sufficiently direct and sufficiently in the United States that Congress would have wanted an American court to hear the case?" (internal quotation marks omitted). *Id.* at 23a-24a. The majority rejected Petitioner's claim that by accepting the reward offer in Miami, Respondents' commercial activity caused a direct effect in the United States. In the majority's view, Petitioner's "acceptance-related activity" consisted of a "one-off telephone communication" between Peru's then Minister of the Interior and the FBI. *Id.* at 25a. Noting that in the context of personal jurisdiction, a single call would not be sufficient to establish minimum contacts, Judge Tjoflat determined that the call did not result in a direct effect in the United States. *Id.* The majority likewise rejected Petitioner's claim that the failure to make payment within the United States constituted a direct effect. *Id.* Finally, Judge Tjoflat discounted the FBI's arrest of Petitioner as constituting a direct effect. The arrest resulted, concluded the court, not from Respondents' commercial activity, but from Petitioner's criminal acts in the United States. *Id.* at 25a-26a.

Judge Cox dissented, finding that the question of whether Respondents were entitled to immunity was no longer at issue. According to Judge Cox, the majority's view to the contrary rested on a "faulty premise." *Id.* at 27a. "In deciding that the [commercial activity] exception applies to Peru's actions," Judge Cox explained that the prior panel's decision "necessarily decided that a nexus existed between that commercial activity and the United States." *Id.* at 28a. He added that the *Guevara I* panel "implicitly held that the commercial activity was carried on in the United States, that an act was performed in the United States in connection with commercial activity elsewhere, or that a direct effect of the commercial act was caused in the United States." *Id.*

6. The commercial activity exception lists three grounds under which immunity may be overcome. 28 U.S.C. § 1605(a)(2). Under the third ground, a sovereign will not be entitled to immunity where a lawsuit is based "upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." *Id.* In *Weltover,* this Court granted review to consider the meaning of the phrase "direct effect," as used in the commercial activity exception. Finding that "an effect is direct if it follows as an immediate consequence of the defendant's . . . activity," the Court expressly rejected the notion that the commercial activity exception "contains any unexpressed requirement of 'substantiality' or 'foreseeability.'" *Weltover,* 504 U.S. at 618 (internal quotation omitted, ellipsis in original).

In light of its decision in *Weltover*, this Court vacated and remanded for further consideration the

Second Circuit's decision in *Antares Aircraft, L.P. v. Fed. Republic of Nigeria,* 505 U.S. 1215 (1992). On remand, Judge Winter, writing for a divided panel, reanimated the "substantiality" requirement that this Court rejected in *Weltover.* Although this Court "did not expressly adopt [the Second Circuit's] 'legally significant acts' test," Judge Winter explained, it "used a similar analysis." *Antares Aircraft, L.P. v. Fed. Republic of Nigeria,* 999 F.2d 33, 36 (2d Cir. 1993). On this basis, the Second Circuit has continued to apply the "legally significant act" requirement. From *Antares* surged the conflict that continues to divide the circuits.

REASONS FOR GRANTING THE WRIT

The Foreign Sovereign Immunities Act is the sole basis for obtaining jurisdiction over a foreign state in a court in the United States. This case implicates the commercial activity exception – the most significant of the FSIA's exceptions. Because sovereign states are presumptively immune, the determination of whether the commercial activity exception applies will be case dispositive. Although this Court previously considered the meaning of the commercial activity exception, its decision did not bring uniformity to the circuits. To the contrary, this Court's decision resulted in a deep and pervasive conflict among the federal courts. That division, as the Eleventh Circuit's decision here demonstrates, continues to deepen. Even within the camp that has strayed from this Court's original ruling, divisions are forming. A conflict among the circuits regarding the sole vehicle for obtaining jurisdiction over a foreign sovereign is untenable.

This case presents an ideal opportunity for resolving this conflict. First, the question presented

was raised below and directly addressed by the Eleventh Circuit, twice. Second, the question presented is likely to recur frequently.[2] Finally, this case raises an important question of public policy. As the Eleventh Circuit here acknowledged, Respondents' refusal to pay the reward monies "jeopardize[s] not only its vital interests but those of every country that offers rewards for information, including this country." App. at 72a-73a. The need to resolve the conflict here is even more important in light of the division between the FBI and the Department of State that this case has exposed. While the FBI directly urged Respondents to pay the reward, the State Department took the opposite approach. The policy divide between these two important entities, brought to light by the unique facts here, confirms this case's significance.

I. This Court Should Grant Review To Definitively Settle The Split Among The Circuits Regarding The Meaning Of The FSIA'S Commercial Activity Exception.

In *Weltover*, this Court rejected the notion that the commercial activity exception "contains any unexpressed requirement of substantiality or foreseeability." 504 U.S. at 618 (internal quotation marks omitted). As a consequence, this Court ruled that "an effect is direct if it follows as an immediate consequence of the defendant's . . . activity." *Id.*

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[2] *See, e.g., Leviathan Inc.*, ECONOMIST, Aug. 7, 2010, at 9-10 (reporting that sovereign governments are increasingly becoming involved in private business enterprises in an effort to jump-start local economies, highlighting that "[n]ine of the world's 30 largest listed firms are emerging-market companies that count the state as their dominant shareholder.").

(internal quotation omitted, ellipsis in original). This Court's decision in *Weltover,* however, did not settle the question. *See* Joseph F. Morrissey, *Simplifying the Foreign Sovereign Immunities Act: If a Sovereign Acts Like a Private Party, Treat it Like One*, 5 CHI. J. INT'L L. 675, 687 (2005) ("The *Weltover* decision ignited confusion and controversy over whether the direct effect clause mandates a finding of a legally significant act in the United States.").

Shortly after this Court ruled, the Tenth Circuit acknowledged its continuing "struggle[] to identify objective standards that would aid in determining what does and does not qualify as a 'direct effect in the United States.'" *United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass'n,* 33 F.3d 1232, 1237 (10th Cir. 1994). The court explained that "[t]he phrase itself seems hopelessly ambiguous when applied to any particular transaction." *Id.* Lamenting what it saw as the lack of any guidance, the Tenth Circuit concluded that "[t]he guideposts previously adopted by many courts – the requirement that a direct effect be both 'substantial' and 'foreseeable' – was expressly rejected by the Supreme Court in *Weltover." Id.*

The twin guideposts of "substantiality" and "foreseeability," however, have failed to bring uniformity to the circuits' view of what constitutes a "direct effect." The Second, Ninth, and Eleventh Circuits have returned to the "legally significant act" requirement that this Court expressly rejected in *Weltover.* Yet, the re-introduction of this test has only caused more division. The "legally significant act" requirement is susceptible to various interpretations. The courts part ways, for example, in their analyses of

the act's location. Some contend that a "legally significant act" must occur within the United States, while others will deem the act "significant" if it occurs abroad. The Eleventh Circuit, in this case, has added another dimension to the conflict, analogizing the "legally significant act" requirement to the minimum contacts test applied in determining whether personal jurisdiction exists. App. at 24a-25a. In sharp contrast, the Fifth, Sixth, and Tenth Circuits have rejected the "legally significant act" requirement, noting that its imposition not only conflicts with this Court's ruling in *Weltover,* but with the commercial activity exception's plain meaning. Therefore, the conflict among the circuits is deep, pervasive, and, given the Eleventh Circuit's ruling here, likely to expand, especially within those circuits applying the "legally significant act" requirement.

1. Following *Weltover,* this Court vacated and remanded for further consideration the Second Circuit's decision in *Antares Aircraft, L.P. v. Fed. Republic of Nigeria,* 505 U.S. 1215 (1992). On remand, the Second Circuit noted that although this Court "did not expressly adopt [the Second Circuit's] 'legally significant acts' test, it used a similar analysis." *Antares Aircraft, L.P.*, 999 F.2d at 35. Because this Court's analysis of the "direct effect" clause did not foreclose the result reached by the Second Circuit through its application of the "legally significant acts" requirement, the Second Circuit determined that the test remained "viable." *Hanil Bank v. PT. Bank Negara Indonesia, (PERSERO),* 148 F.3d 127, 133 (2d Cir. 1998); *see also Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922, 931 (2d Cir. 1998) (recognizing the "legally significant acts" test and explaining that it "requires that the conduct having a direct effect in the

United States be legally significant conduct in order for the commercial activity exception to apply").[3] Applying the same reasoning, the Ninth and Eleventh Circuits have likewise adopted the "legally significant acts" requirement. *See Adler v. Fed. Republic of Argentina,* 107 F.3d 720, 726-27 (9th Cir. 1997) (recognizing application of the Second Circuit's "legally significant acts" test); *see also Harris Corp. v. Nat'l Iranian Radio and Television,* 691 F.2d 1344, 1351 (11th Cir. 1982).

What constitutes a legally significant act, however, remains unsettled. The test, as the Tenth Circuit has observed, "is defined in different ways." *Orient Mineral Co. v. Bank of China,* 506 F.3d 980, 998 (10th Cir. 2007). Some courts have ruled that the location of the legally significant act is dispositive. The Second Circuit and the Eleventh Circuit here have held that a legally significant act would satisfy the "direct effects" test if it occurred inside the United States. *See* App. at 23a-24a ("As we have framed it, the question presented is, was the effect sufficiently 'direct' and sufficiently 'in the United States' that Congress would have wanted an American court to hear the case?") (internal quotation omitted); *Virtual Countries, Inc. v. Republic of S. Africa,* 300 F.3d 230, 240-41 (2d Cir. 2002) (holding that for the "direct effect" clause to apply, a sovereign must commit a legally significant act in the United States). The Ninth Circuit, in turn, has determined that an act taking place outside the

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[3] Although the Second Circuit made no mention of the "legally significant act" requirement in deciding *Commercial Bank of Kuwait v. Rafidain Bank,* 15 F.3d 238 (2d Cir. 1994), it specifically referenced and applied the requirement in its subsequent decisions.

United States can result in a "direct effect" in the United States. *See Adler v. Fed. Republic of Nigeria,* 219 F.3d 869, 876 (9th Cir. 2000) (finding that reliance by U.S.-based plaintiff on fraudulent statements made outside the United States is sufficient to satisfy the "direct effect" clause).

The location of the act itself, however, may not be dispositive. In this case, the Eleventh Circuit has equated the legally significant act requirement with the minimum contacts test applied in the personal jurisdiction context. App. at 25a (concluding that the same reasoning used in a minimum contacts analysis applied equally to jurisdictional questions under the "direct effect" clause). Thus, while a single act, committed in the United States, may be sufficient in some circuits that impose the "legally significant acts" requirement, it may fall short in the Eleventh Circuit. Even before the Eleventh Circuit here added further to the division on the meaning of the "legally significant acts" requirement, the Tenth Circuit questioned its application: "the phrase . . . is vague and ambiguous, adding nothing to the analysis." *Orient Mineral Co.,* 506 F.3d at 999.

2. In sharp contrast, the Fifth, Sixth, and Tenth Circuits have rejected the "legally significant act" requirement as inconsistent with this Court's decision in *Weltover. See Orient Mineral Co. v. Bank of China,* 506 F.3d 980, 998 (10th Cir. 2007); *Am. Telecom Co., L.L.C.. v. Republic of Lebanon,* 501 F.3d 534, 540 (6th Cir. 2007); *Voest-Alpine Trading USA Corp. v. Bank of China,* 142 F.3d 887, 895 (5th Cir. 1998). These circuits view the proper interpretation of the "direct effect" clause as grounded in the plain meaning of the commercial activity exception. In these circuits, the

imposition of the "legally significant act" requirement fails because it conflicts with the plain language of the statute, and renders portions of the commercial activity exception superfluous. The Fifth Circuit's decision in *Voest-Alpine* analyzed the problems inherent in the "legally significant act" requirement at length.

Writing for a unanimous panel of the Fifth Circuit, Judge Jolly explained that "nothing in the text of the third clause supports" the "legally significant act" requirement. *Voest-Alpine,* 142 F.3d at 894. The commercial activity exception's third clause, explained the court, "simply requires (1) an act outside the United States (2) in connection with commercial activity outside the United States (3) that causes a direct effect in the United States." *Id.* (citing 28 U.S.C. § 1605(a)(2)). Because this Court in *Weltover* "expressly admonished the circuit courts not to add 'any unexpressed requirement[s]' to the third clause and specifically rejected the argument that direct effects must be substantial or foreseeable," the court determined that the "legally significant act requirement" has been "renounced." *Id.* (alteration in original).

Directly addressing the sole argument raised by the competing circuits, the Fifth Circuit noted that "*Weltover's* reliance on a legally significant act in the United States does not justify, much less compel, the conclusion that it is or should be some kind of threshold requirement under the third clause." *Id.* To the contrary, the court explained, "[a] legally significant act in the United States will certainly cause a direct effect in the United States, but that does not mean that a direct effect in the United States can be

caused *only* by a legally significant act in the United States." *Id.* (emphasis in original).

Second, Judge Jolly explained that the imposition of a "legally significant act" requirement would render certain portions of the commercial activity exception superfluous. "[R]equiring the effect to have a causal nexus with some legally significant act in the United States merges the third clause into the second clause of the commercial activity exception." *Id.* at 895. The court noted that "[t]he second clause requires that the cause of action be based upon (1) an act in the United States (2) in connection with commercial activity outside the United States." *Id.* (citing 28 U.S.C. § 1605(a)(2)). Analyzing the second clause, the court reasoned that "the act *in the United States* must give rise to the cause of action or, in other words, be a 'legally significant act' as the term is used by courts adopting such a requirement." *Id.* (emphasis in original). By reading the statute this way, Judge Jolly explained, the second clause becomes "indistinguishable" from the third clause. *Id.* If anything, "the third clause would also require proof of an act outside the United States upon which the action is also based and which caused a direct effect in the United States." *Id.* Judge Jolly reasoned that this interpretation "leaves [the third clause] with no perceivable purpose, as plaintiffs would always opt to seek jurisdiction under the 'lesser included' second clause." *Id.*

3. This case presents an ideal vehicle for resolving the conflict among the circuits. The core facts are undisputed. Respondents offered a monetary reward in exchange for information leading to the capture of a fugitive. The offer itself constituted commercial

activity. App. at 17a. Moreover, under Florida law, Respondents' offer became a binding contract when Petitioner accepted the offer by performing, i.e., he provided information and coordinated efforts from the United States which led to the location and capture of the fugitive Montesinos. *Id.* at 39a. The sole question before the Eleventh Circuit was whether Respondents' offer, and their activities in connection with that offer, were sufficient to waive immunity. *Id.* at 19a. The issue was squarely addressed by the appellate court, and is dispositive of this case.

II. By Allowing Respondents To Welch On Their Promise To Pay The Reward, The Decision Below Undermines Both Domestic and International Efforts To Capture Criminals And Terror Suspects.

This case is about more than the proper reading of the commercial activity exception. Because of the unique facts here – the exchange of money for information regarding the location of an international fugitive – the Eleventh Circuit's decision reversing summary judgment will have far-reaching consequences. Writing for a unanimous panel in *Guevara I*, Judge Carnes made clear that "[e]nforceable commitments are important to reward programs, which are in turn important to the sovereign interests of this and other countries." App. at 74a-75a. The Eleventh Circuit's decision reversing summary judgment undermines not only the value of reward programs, but the interests of those sovereigns offering payment for vital information.

In the United States, there are a number of statutes that authorize the executive branch to offer

financial rewards in exchange for information useful in combating terrorism, espionage, narcotics trafficking, violations of human rights laws, and other criminal acts. *Id.* at 73a (collecting statutes). These programs benefit not only the United States, but our allies abroad. Indeed, even Respondents, who have thus far refused to honor their own reward offers, are directly benefiting from similar U.S. reward programs.

Notably, the United States is currently offering rewards for the arrest and/or conviction of two Peruvian fugitives – Florindo Eleuterio Flores-Hala[4] and Victor Quispe Palomino.[5] The U.S. Department of State describes both men as members of the Sendero Luminoso (the "Shining Path"),[6] "a notoriously violent terrorist group that controlled large areas of Peru and struck the capital Lima with repeated violent attacks."[7] The award amount – up to $5 million per person[8] – is the very same amount Respondents offered Petitioner for the location and capture of Montesinos. These reward programs are effective

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[4] UNITED STATES DEP'T OF STATE, Narcotics Rewards Program: Florindo Eleuterio Flores-Hala, http://www.state.gov/p/inl/narc/rewards/144800.htm (last visited Sept. 14, 2010).

[5] UNITED STATES DEP'T OF STATE, Narcotics Rewards Program: Victor Quispe Palomino, http://www.state.gov/p/inl/narc/rewards/144801.htm (last visited Sept. 14, 2010).

[6] UNITED STATES DEP'T OF STATE, Bureau of Consular Affairs, Peru: Country Specific Information, http://travel.state.gov/travel/cis_pa_tw/cis/cis_998.html (last visited Sept. 14, 2010).

[7] *See supra*, notes 4-5.

[8] *Id.*

precisely because the United States has a track record of payment.

Since September 11, 2001, the United States has paid at least $47 million in reward monies. App. at 73a. The success of these programs turns on this country's willingness to honor its promises to pay:

> Had the KGB agent who accepted the reward offer in the [Bob] Hanssen case had reason to doubt whether the United States would pay as promised, he would not have risked his life to provide the information that he did, information that was vital to this country's national security interests. The same is true of those who provided the information that enabled the United States to corner Uday and Quasay Hussein and to capture Ramzy Yousef.

Id. at 74a. Although none of the statutes authorizing the United States government to pay reward monies "contains a waiver of sovereign immunity," Judge Carnes aptly noted that "reward offers are only as effective as they are enforceable." *Id.* With good reason then, Judge Carnes concluded that "[a]bsent a clear requirement in the FSIA, we will not create impediments to the enforcement of reward contracts entered by this or any other country." *Id.* at 75a. And yet, there can be no greater impediment to the effectiveness of such reward programs than the Eleventh Circuit's decision in *Guevara II*.

In reversing the district court's summary judgment, the Eleventh Circuit treated this case like any other piece of commercial litigation. In so doing, the panel that decided *Guevara II* ignored the significant public

policy considerations Judge Carnes had identified in his prior decision reversing the dismissal of Petitioner's complaint. This is not a typical fact pattern; this case does not involve the type of commercial activity regularly considered by the courts in determining whether an exception to the FSIA's presumed immunity applies. *See, e.g., Weltover*, 504 U.S. at 609-10 (default on bond obligations by failure to make payment); *Am. Telecom*, 501 F.3d at 536-37 (breach of contract and associated tort claims premised on a bidding contract to manage cellular telephone networks); *Hanil Bank*, 148 F.3d at 129-30 (failure to remit payment due under a letter of credit).[9] As such, this case requires closer scrutiny. In the current security environment, U.S. courts ought not to be seen as hostile to claims such as those raised by Petitioner.

Indeed, what is particularly astonishing about the result here is the division it has exposed between the FBI, the nation's premier law enforcement agency, and the Department of State. Throughout the life of this litigation, the FBI has steadfastly supported Petitioner's claim to the reward. Directly appealing to the highest levels of Peru's government, the FBI confirmed Petitioner's decisive role in the location and capture of Montesinos and urged that Respondents pay the reward. App. at 80a-83a. The FBI's concern, of course, is obvious.

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[9] The atypical nature of the facts here, however, does not render this an improper vehicle for resolving the question presented. To the contrary, the facts here highlight the need to resolve the conflict among the circuits. The question presented not only includes the standard commercial activity considered by the courts, but the unique facts of this case which reflect the current security environment.

As a law enforcement agency, the FBI is well-acquainted with the vital role that informants play in the capture and prosecution of fugitives and, in the wake of 9/11, the fight against terrorism. *See United States v. Ihnatenko*, 482 F.3d 1097, 1100 (9th Cir. 2007) (noting that "[p]aid informants play a vital role in the government's infiltration and prosecution of major organized crime and drug syndicates," and that "[w]ithout informants, law enforcement authorities would be unable to penetrate and destroy organized crime syndicates, drug trafficking cartels, bank frauds, telephone solicitation scams, public corruption, terrorist gangs, money launderers, espionage rings, and the likes"); *see also* Kent Roach, *Review and Oversight of National Security Activities and Some Reflections on Canada's Arar Inquiry*, 29 CARDOZO L. REV. 53, 77, 83 (2007) (arguing that "[p]articular care should be taken with respect to the proper treatment of informants and witnesses who play a vital role in successful terrorism prosecutions" and that judicial review of complaints from informants is critical to ensure that the legal rights of informants are protected).

In sharp contrast, the State Department urged the appellate court to reverse. Ignoring the requirements of modern law enforcement, the diplomats claimed that principles of "international comity" should control the outcome here. This yawning conceptual gap further highlights the urgent need for this Court's intervention.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A

[PUBLISH]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-17213

D. C. Docket No. 04-23223-CV-MGC

[Filed June 18, 2010]

JOSE GUEVARA,	)
	)
Plaintiff-Counter-Defendant-Appellee Cross-Appellee,	)
	)
LUIS ALFREDO PERCOVICH,	)
	)
Proposed Intervenor-Appellant,	)
	)
versus	)
	)
REPUBLIC OF PERU, MINISTERIO DEL INTER,	)
	)
Defendants-Counter-Claimants Cross-Appellants,	)

ANTONIO KETIN VIDAL, individually, FERNANDO ROSPIGLIOSI, individually, DEPARTMENT OF JUSTICE,

Defendants.

Appeals from the United States District Court for the Southern District of Florida

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(June 18, 2010)

Before TJOFLAT and COX, Circuit Judges, and KORMAN,* District Judge.

TJOFLAT, Circuit Judge:

The Republic of Peru, two of its ministries, and two of its government officials (collectively "Peru") appeal the district court's award of summary judgment to Jose Guevara on Guevara's claim that Peru owed him $5 million in reward money for information that lead to the arrest of Peru's former spy chief, Vladimiro Lenin Montesinos Torres ("Montesinos"). Peru contends that the district court should have recognized its sovereign immunity and therefore dismissed Guevara's claim for lack of subject matter jurisdiction. Luis Alfredo Percovich appeals the district court's denial of his motion to intervene in the case (after the

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* Honorable Edward R. Korman, United States District Judge for the Eastern District of New York, sitting by designation.

court granted Guevara's motion for summary judgment but prior to its entry of final judgment) for the purpose of claiming the award.[1] We agree with Peru that the district court lacked subject matter jurisdiction and therefore reverse its judgment and remand the case with the instruction that it be dismissed without prejudice.

I.

A.

This case's facts read like the latest spy thriller. An earlier, and partial, recitation of the facts appears in this court's opinion in Guevara v. Republic of Peru, 468 F.3d 1289 (11th Cir. 2006) ("Guevara I"), which we recite in this subpart. In the 1990s, Montesinos was the head of Peru's National Intelligence Agency. During that time, while discharging the duties of his office, he purportedly committed several crimes—arms trafficking, drug dealing, money laundering, extortion, bribery, and "more than a few murders." Id. at 1292. The Peruvian media obtained videotapes of his participation in some of these crimes, including bribery, and after the videotapes became public, President Alberto Fujimori announced in September 2000 that he would dissolve the intelligence agency and step down as president. Montesinos, seeing the writing on the wall, fled the country, first into Venezuela, then, it seemed, into thin air.

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[1] Percovich filed his notice of appeal first. Peru followed several days later. Peru's appeal is therefore a cross-appeal. We refer to the cross-appeal as the appeal because our disposition of it renders Percovich's appeal effectively moot.

A manhunt ensued, and in April 2001, Peru's Interim President, Valentin Corazao, issued an Emergency Decree that provided for a $5 million reward for the "person or persons who provide(s) accurate information that will directly enable locating and capturing" Montesinos. Id. at 1293.[2] The decree established a committee, the Special High Level Committee ("SHLC"), as part of the Ministry of the Interior to receive such information and assess its accuracy.[3] The decree authorized the Peruvian government to obtain a loan from a Peruvian bank to pay the reward, with the funds to be deposited in a Peruvian account in the interim. The reward would be paid twenty-four hours after Montesinos's capture.[4]

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[2] The Emergency Decree was posted on the website of Peru's official daily publication, El Peruano.

[3] The Emergency Decree itself was attached to Guevara's motion for summary judgment, which, as discussed infra, he filed in the district court after remand in Guevara I. The certified court translator noted that Peru's Ministry of the Interior is equivalent to the United States Department of Homeland Security. We assume, therefore, that Peru's Minister of the Interior, to whom we refer throughout the opinion, holds a position comparable to the United States' Secretary of Homeland Security.

[4] As stated in Guevara I,

> Article One of [the Emergency Decree] provided that Peru thereby:
>
> > Establish[ed] a financial reward in the amount of U.S. $5,000,000.00 (FIVE MILLION 00/100 UNITED STATES DOLLARS), which shall be given to the person or persons who provide(s) accurate information that will directly enable locating and capturing Vladimiro Lenin Montesinos Torres. In the event several persons provide

It turned out that Guevara, a Venezuelan national, was providing Montesinos with a hiding place and a security detail in Caracas, Venezuela. In addition, Guevara was handling Montesinos's communications with Pacific Industrial Bank in Miami, Florida, where Montesinos maintained a bank account. When the bank declined his request to transfer his funds to another bank, Montesinos emailed Percovich, the officer assigned to the account, threatening him with physical harm unless the bank honored his request. Montesinos then sent Guevara to Miami with instructions for Percovich. Percovich, aware that Guevara was coming to Miami, contacted the FBI in the meantime to inform them of Montesinos's threat and Guevara's involvement with Montesinos, so when Guevara arrived in Miami in June 2001, the FBI detained him and prepared to charge him with a criminal offense.[5] The FBI informed Guevara that he

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> the said information, the financial reward shall be divided among them.

(Compl. Ex. A). Article Three of the decree defined "accurate information":

> For purposes of this Emergency Decree, accurate information shall be that [information] provided through any means to the Special High Level Committee and which enables locating and capturing Vladimiro Lenin Montesinos Torres, who is wanted.
>
> Id. (bracketed word in original)

Guevara I, 468 F.3d at 1293.

[5] The record before the district court, when it ruled on Guevara's motion for summary judgment following the disposition of Guevara I, reveals that the FBI was in the process of filing a

would not be charged if he disclosed Montesinos's whereabouts. And, if Montesinos was captured, Guevara could claim the $5 million reward Peru had posted.[6]

Guevara cooperated; he revealed Montesinos's location in Caracas and arranged through some of his associates in Caracas for Montesinos to be delivered into the hands of Venezuelan officials. They arrested Montesinos and turned him over to the Peruvian authorities. Peru, however, refused to pay Guevara the $5 million reward.

B.

Guevara sued Peru in Florida state court, and Peru removed the case to the United States District Court for the Southern District of Florida under 28 U.S.C. § 1441(d). Guevara framed his complaint in five counts, as set out in the margin.[7] Peru moved to

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criminal complaint charging Guevara with conspiring with Montesinos to threaten Percovich through a series of emails. The charges were later dismissed due to Guevara's assistance to the FBI in capturing Montesinos.

[6] The FBI was aware of the reward because it had been widely publicized.

[7] Count One alleged breach of contract by the Republic of Peru. Count Two alleged breach of contract implied in law by the Republic of Peru. Count Three alleged breach of contract by the Ministry of the Interior. Count Four alleged fraudulent inducement by the Minister of the Interior during the events leading to Montesinos's capture. Count Five (mislabeled as Count Four) alleged fraudulent misrepresentation by the new Minister

dismiss the case pursuant to Federal Rule of Civil Procedure 12(b)(1), arguing the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602–1611, rendered it immune from suit. The district court granted Peru's motion on the ground that Peru's conduct did not fall under any of the enumerated exceptions to the FSIA's presumption of sovereign immunity. Guevara then appealed the dismissal to this court.

We held that Peru's offer of a reward fell within the FSIA's commercial activity exception.[8] We reasoned that instead of using its own police and investigatory powers to search for Montesinos, Peru "'ventured into the marketplace' . . . to buy the information needed to get its man." Guevara I, 468 F.3d at 1299 (quoting Hond. Aircraft Registry, Ltd. v. Gov't of Hond., 129 F.3d 543, 547 (11th Cir. 1997)). Because sovereign

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of the Interior, who assumed that position when the former minister left office in July 2001.

[8] As detailed infra, the FSIA creates a presumption that foreign sovereigns are immune from suit in U.S. courts unless they fall under an exception within the statute. 28 U.S.C. § 1604. The commercial activity exception prevents a foreign state from claiming immunity in cases

> in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

Id. § 1605(a)(2).

states can engage in commercial activities by contracting with private parties, id. at 1300, and because Peru acted like a private party in entering the market for rewards, id. at 1301, the FSIA's definition of "commercial activity" in 28 U.S.C. § 1603(d) fully encompassed the reward, id. at 1305. In turn, because a state's private, commercial acts divest it of sovereign immunity under the so-called "restrictive theory," id. at 1297, Peru was not immune from suit under the FSIA's exception. We accordingly vacated the district court's judgment and remanded the case for further proceedings.

On remand, the district court issued a new scheduling order and the parties engaged in discovery. At the close of discovery, Guevara moved the court for summary judgment on two counts of his complaint, those claiming breach of contract,[9] arguing that he was entitled to the reward because he had fulfilled the terms of Peru's offer. Deposition and affidavit evidence submitted in support of Guevara's motion had provided new information about Guevara's role in Montesinos's capture. We now recount the facts that evidence established.[10]

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[9] Counts One and Three. See supra note 7. The district court dismissed Count Two on Guevara's stipulation and, in a separate order, granted summary judgment to the two Ministers of the Interior on Counts Four and Five. The parties do not contest that order.

[10] We recount the facts in the light most favorable to Guevara.

C.

Guevara was formerly an officer in the Venezuelan intelligence agency, Dirección Nacional de los Servicios de Inteligencia y Prevención ("National Directorate of Intelligence and Prevention Services") ("DISIP").[11] On December 15, 2000, Guevara received a telephone call from his second cousin asking him to receive a visitor at Guevara's residence in Caracas. Later that day, one Julio Ayala brought a man wearing facial bandages, whom Ayala identified as Manuel Rodriguez, to Guevara's house. Guevara later realized that the man going by the name Manuel Rodriguez was actually Montesinos, who had undergone facial reconstructive surgery to conceal his identity.

Guevara's second cousin asked Guevara to provide ongoing security for Montesinos. Guevara agreed and saw to it that Montesinos was protected while he was in hiding in Caracas.[12] For his part, Montesinos used Guevara as an intermediary to run personal errands and to arrange for the deposit of funds into

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[11] DISIP has since been redesignated as Agencia Bolivariana de Noticias ("Bolivarian Intelligence Service"). Agencia Bolivariana de Noticias, Venezuelan Disip to be now designated as Bolivarian Intelligence Service, http://www.abn.info.ve/noticia.php?articulo=210391 (last visited May 4, 2010).

[12] Two days after receiving Montesinos, Guevara moved Montesinos to the Caracas home of a sister of Jose Luis Nunez, who had previously worked as a bodyguard for Guevara. Nunez apparently did not serve as Montesinos's bodyguard; his role appears to have been limited to providing a hiding place for Montesinos at his sister's home. Approximately three to four weeks prior to his capture, Montesinos moved to Nunez's home for, according to Guevara, "strategic reasons."

Montesinos's accounts in U.S. banks. On June 20, 2001, Guevara traveled to Miami for Montesinos to deliver an envelope to Percovich at Pacific Industrial Bank. The envelope contained a letter instructing Percovich to give Guevara $700,000 cash from Montesinos's account at the bank, and to transfer $3 million from that account to an account Montesinos had opened at another bank.[13] Guevara met Percovich at the Intercontinental Hotel in Miami on June 22 and gave him the envelope. While Guevara was leaving the Intercontinental Hotel, FBI agents arrested him.[14]

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[13] Apparently, the FBI had notified Pacific Industrial Bank of Montesinos's fugitive status, and the bank had frozen Montesinos's account.

[14] On June 24, 2001, an FBI special agent swore out a criminal complaint against Guevara, charging him with violating 18 U.S.C. §§ 875(b), 371, and 2. The complaint charged Guevara with conspiring with Montesinos to threaten Pacific Industrial Bank and its officials, specifically Percovich, with harm if they did not deliver the money in accordance with Montesinos's instruction. Section 875(b) provides that

> [w]hoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 875(b). The alleged § 875(b) violation formed the predicate offense for the § 371 charge. Section 371 reads:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act

After the agents took Guevara into custody, they questioned him briefly at the hotel where he was staying, then moved him to the FBI office in Miami.

The questioning resumed at the FBI office. The agents informed Guevara of the $5 million reward for information that would lead to Montesinos's capture. Guevara decided to cooperate, in that he would give the agents Montesinos's location if the charges were dropped and he received the reward. At this point, Agent Waldo Longa made a telephone call, then told Guevara that if he gave the FBI Montesinos's address and telephone number in Caracas, he would be released, the charges would be dropped, and he would receive the $5 million reward. Guevara agreed to do that, and under the supervision of FBI agents, he called Jose Luis Nunez's residence, where Montesinos was hiding. Guevara briefly spoke with Montesinos and, as the FBI had instructed, told Montesinos that Percovich had received the envelope. The FBI transmitted this information to Venezuelan

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> to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 371. Lastly, § 2 governs accomplice liability:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 2.

authorities, who were cooperating with the Peruvian authorities, and developed a plan for Guevara's associates in Venezuela to deliver Montesinos to the Peruvian embassy in Caracas on June 23.[15]

On the evening of June 22, the FBI transferred Guevara to the Federal Detention Center in Miami for overnight custody. The following morning, June 23, the FBI brought Guevara back to its Miami office, where he made more telephone calls to his Venezuelan associates, including Nunez, to coordinate Montesinos's handover to the Peruvian embassy.[16] Nunez assured Guevara that Montesinos would be handed over later that day, and Guevara relayed this assurance to the FBI.

While Guevara was in the FBI office that day, Agent Longa informed Guevara that he had spoken by telephone with the FBI agent responsible for overseeing the FBI interests in Peru, Kevin Currier,[17]

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[15] The FBI did so because, following Montesinos's disappearance and the posting of the $5 million reward, the United States had agreed to cooperate with Peru in trying to locate Montesinos. The plan was developed by Kevin Currier, who was an FBI special agent stationed in Chile, see infra note 17, and FBI agents in Miami.

[16] The record is not clear about the identity of these associates, other than Nunez. We assume Guevara had enlisted others to assist in hiding Montesinos at Nunez's house.

[17] At the time of these events, Kevin Currier was an FBI supervisory special agent and legal attaché stationed at the U.S. embassy in Santiago, Chile. At that post, Currier also had territorial responsibility for the FBI's objectives in Peru. Currier was involved in the case because in December 2000, he had

and with Antonio Ketin Vidal Herrera ("Vidal"), Peru's Minister of the Interior.[18] During the call, Vidal said that Guevara would be eligible to receive the $5 million reward if he gave the FBI Montesinos's location in Caracas. Several hours after this conversation, the FBI asked Guevara to give final instructions to Nunez on where to turn over Montesinos; Guevara complied, and Nunez agreed to the instructions. On June 24, Longa told Guevara that Montesinos had been captured by Venezuelan authorities in Caracas the day before. On June 25, Guevara was released from custody, and the charges against him were dismissed.

D.

Peru responded to Guevara's motion for summary judgment by arguing that based on the facts that had been developed on remand, the district court should dismiss the case on the ground that Peru had not waived its sovereign immunity under 28 U.S.C. § 1605(a). In an order entered on September 9, 2008, the district court rejected the argument, concluding that Guevara I had decided the sovereign immunity issue adversely to Peru.[19] The court therefore

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responded to a request by the U.S. Ambassador to Peru for the FBI's assistance in apprehending Montesinos.

[18] Currier had called Longa from Chile earlier in the day and, after reaching Longa, arranged to have Vidal join their telephone conversation from Peru.

[19] The district court disposed of Peru's sovereign immunity argument with this brief comment: "jurisdiction in this case has been established" by Guevara I.

proceeded to rule on the merits of Guevara's motion for summary judgment. The court held that the Emergency Decree had created a unilateral contract and that Guevara had satisfied the performance the contract called for by providing information that led to Montesinos's capture. Then, relying on an August 5, 2002 SHLC resolution acknowledging that Guevara had provided such information and that the SHLC would evaluate his reward request, the court effectively preempted the SHLC's evaluation decision—concluding that, on the basis of the record before the court, the SHLC was bound to honor Guevara's request and thus to give him the entire $5 million reward.

On September 18, 2008, after the district court had granted Guevara's motion for summary judgment but before it entered final judgment in the case, Percovich moved the court, pursuant to Federal Rule of Civil Procedure 24(a)(2), to grant him intervention as of right as a co-plaintiff, or alternatively, to stay further proceedings in the case. Percovich claimed that he was responsible for causing Guevara to cooperate with the FBI and to reveal Montesinos's whereabouts, and that but for his (Percovich's) cooperation, Montesinos would not have been captured. As a result, Percovich contended, he was entitled to at least a share of the reward, and his rights would go unprotected if he were denied an opportunity to prove his claim to the reward money. The district court denied Percovich's motion on December 1, 2008. On December 17, 2008, the district court entered final judgment in Guevara's favor for $5

million plus pre- and post-judgment interest. Percovich's appeal and Peru's cross-appeal followed.[20]

II.

Peru contends that the district court should have dismissed the case for lack of subject matter jurisdiction on the ground that it is entitled to sovereign immunity under 28 U.S.C. § 1605(a). Assuming that we hold that it was not entitled to sovereign immunity, Peru contends that the district court erred in granting Guevara's motion for summary judgment on the merits. Percovich contends that the court abused its discretion in refusing to grant him intervention as of right. If Peru is entitled to sovereign immunity, the case is due to be dismissed for want of subject matter jurisdiction, and we would be foreclosed from proceeding further. We therefore turn to the question of whether Peru is entitled to sovereign immunity under § 1605(a).

The district court concluded that, in Guevara I, we already resolved this § 1605(a) issue. We disagree. We begin with the proposition that the FSIA "provides the sole basis for obtaining subject matter jurisdiction over a foreign sovereign in the United States," Guevara I, 468 F.3d at 1294, and grants original jurisdiction over nonjury civil actions against foreign states, 28 U.S.C. § 1330(a).[21] The exercise of that jurisdiction is limited

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[20] We have jurisdiction of the appeal from the district court's final judgment under 28 U.S.C. § 1291.

[21] This section provides:

> The district courts shall have original jurisdiction without

to the FSIA's exceptions to the general rule that foreign sovereigns enjoy immunity from suit in United States courts. Id.; see also id. § 1605(a). Section 1605, "General exceptions to the jurisdictional immunity of a foreign state," provides:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> (1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state

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regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605–1607 of this title or under any applicable international agreement.

28 U.S.C. § 1330(a).

> elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605.

In Guevara I, Guevara appealed the district court's decision that Peru was entitled to sovereign immunity because its offer of a reward did not constitute "a commercial activity." In reaching its decision, the district court bypassed the question of whether, assuming that the offer of a reward constituted a commercial activity, Peru established that it had immunity under subsection (a)(2). In appealing the district court's decision, Guevara, in his opening brief, focused his argument for reversal solely on the commercial activity issue. Peru, in its answering brief, did the same. Its brief did not seek affirmance on the additional ground the district court had not reached: whether it had immunity under subsection (a)(2).

Guevara I thus resolved the issue Guevara had raised—whether Peru's offer of a reward was a commercial activity—and resolved it against Peru. In doing so, the court left open, albeit implicitly, the question of whether the district court had subject matter jurisdiction to entertain Guevara's case. Guevara I, 468 F.3d at 1305 ("If the court finds that it does not have subject matter jurisdiction, 'the court's sole remaining act is to dismiss the case for lack of jurisdiction.'") (quoting Morrison v. Allstate Indem. Co., 228 F.3d 1255, 1261 (11th Cir. 2000)).

In holding that Guevara I resolved the sovereign immunity issue against Peru, the district court was, in effect, invoking the law of the case doctrine.

> The law of the case doctrine is not an "inexorable command," White v. Murtha, 377 F.2d [428,] 431 [(5th Cir. 1967)], but rather a salutary rule of practice designed to bring an end to litigation, id., discourage "panel shopping," Lehrman v. Gulf Oil Corp., 500 F.2d 659, 662 (5th Cir. 1974), cert. denied, 420 U.S. 929, 95 S.Ct. 1128, 43 L.Ed.2d 400 (1975), and ensure the obedience of lower courts. United States v. Williams, 728 F.2d 1402, 1406 (11th Cir. 1984). As with the mandate rule, the law of the case doctrine applies to all issues decided expressly or by necessary implication; it does not extend to issues the appellate court did not address. Terrell v. Household Goods Carriers' Bureau, 494 F.2d 16, 19 (5th Cir.[1974]), cert. dismissed, 419 U.S. 987, 95 S. Ct. 246, 42 L. Ed. 2d 260 (1974); Fogel v. Chestnutt, 668 F.2d 100 (2d Cir.1981), cert. denied, 459 U.S. 828, 103 S. Ct. 65, 74 L. Ed. 2d 66 (1982).

Piambino v. Bailey, 757 F.2d 1112, 1120 (11th Cir. 1985).

In light of the parties' Guevara I briefs on appeal and the court's statement that the district court must dismiss the case "if it does not have subject matter jurisdiction," we could hardly say that Guevara I decided all of the sovereign immunity issues § 1605(a)(2) presents. We therefore conclude that those issues—with the exception of whether the offer of a reward constituted "a commercial activity"—remain for decision here. We now address them de novo. Venus Lines Agency v. CVG Industria Venezolana De Aluminio, C.A., 210 F.3d 1309, 1311 (11th Cir. 2000) (per curiam).

Section 1605(a)(2) lists three exclusive bases, or nexuses, for a foreign state's commercial activities to subject it to the United States courts' jurisdiction: in cases (1) based upon commercial activities within the United States, (2) based upon acts performed in the United States "in connection with" commercial activity elsewhere, or (3) based upon acts performed in connection with commercial activity elsewhere that cause a "direct effect" in the United States. See Samco Global Arms, Inc. v. Arita, 395 F.3d 1212, 1216 & n.8 (11th Cir. 2005).

The district court did not analyze whether Peru's activity fell under any of the three bases for jurisdiction in § 1605(a)(2) because it apparently assumed that Guevara I had performed the analysis. Guevara I, however, merely held, as we observed above, that Peru's reward offer constituted commercial activity. It held nothing regarding the existence of subject matter jurisdiction, and, in fact, the opinion implicitly recognized the possibility that the district court could discover a lack of subject matter jurisdiction later in the case.[22] We now embark on the task the district court assumed Guevara I had undertaken: whether Peru was subject to the district court's jurisdiction under one or more of the three jurisdictional nexuses of § 1605(a)(2). In carrying out this task, we rely on the record before the district court when it entertained and granted Guevara's motion for

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[22] The Guevara I opinion did not discuss the nexus requirement of 28 U.S.C. § 1605(a), and after reviewing the parties' Guevara I briefs, we find that the parties did not present the nexus issue to the court in the context of subject matter jurisdiction. We thus reject Guevara's argument that Guevara I decided the nexus issue "by implication."

summary judgment.[23] More to the point, we consider the evidence that bears on § 1605(a)(2)'s three jurisdictional nexuses.

The evidence bearing on the first nexus, commercial activities within the United States, establishes that no such activities occurred in the United States. Rather, the commercial activity in this case, described by Guevara I as an "offer of a reward for information enabling the capture of a fugitive," 468 F.3d at 1301, took place in Peru.[24] First, the Emergency Decree, which created the offer, was published in an official publication in Peru. Second, the Decree established the SHLC to evaluate the veracity of information leading to Montesinos's arrest and decide whether to pay the reward. If the SHLC decided to pay the reward, the payment would be made in Peru from funds the Peruvian government had placed in escrow in a Peruvian bank. In short, all of the SHLC's commercial activity would take place in Peru. Although information leading to Montesinos's capture might be provided by someone in the United

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[23] As stated in note 10, supra, we consider the evidence in that record in the light most favorable to Guevara. We do so because it is Peru's burden to demonstrate the lack of subject matter jurisdiction in the context presented here.

[24] Under the FSIA, "commercial activity" is

> either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

28 U.S.C. § 1603(d).

States, as it was here, the act of providing the information to the SHLC would not be part of the commercial activity.[25] Therefore, by offering the reward, Peru was not waiving its sovereign immunity from suit in the United States by a person who may have provided information that led to Montesinos's capture.

Next, the evidence bearing on the second nexus, acts committed by Peru in the United States "in connection with" commercial activity elsewhere, established that on June 23, Currier (in Chile) placed a long distance telephone call to Longa (in Miami) and to Vidal (in Peru). During the call, Vidal told Longa that Guevara would receive the reward if he provided information that led to Montesinos's capture. The narrow question here is whether Vidal's act of communicating these words to Longa in Miami constituted an act performed in the United States "in connection with" Peru's offer of the reward in Peru and, thus, was sufficient to waive Peru's sovereign immunity under the second nexus.

The SHLC was a special committee of the Ministry of the Interior. Vidal was the Minister of the Interior; we thus assume that he had supervisory authority over the SHLC. Vidal's statement to Longa was a statement he would have made to anyone professing to have information that might lead to Montesinos's capture: "If you believe that your information has led

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[25] If the person providing the information was an agent of the Republic of Peru located in the United States, one could argue that such provision constituted commercial activity by Peru in the United States. See 28 U.S.C. § 1603(e). But that is not the case here.

to Montesinos's capture, you may submit it to the SHLC. If the SHLC determines that it is reliable, you will receive the reward. If similar information is submitted to the SHLC by others and found reliable, they will share in the reward."

If what Vidal said to Longa constituted an act in connection with Peru's offer of the reward, then almost any statement he may have made about the reward to anyone else in the United States would have operated to waive Peru's immunity from suit. We are reluctant to find a waiver based on such de minimis evidence.

The federal courts' application of § 1605's exceptions to sovereign immunity supports our position. For example, section 1605(a)(1) provides that a foreign state shall not be immune in any case "in which [it] has waived its immunity either explicitly or by implication." In Creighton Ltd. v. Government of the State of Qatar, 181 F.3d 118, 122 (D.C. Cir. 1999), the court stated that

> implicit in § 1605(a)(1) is the requirement that the foreign state have intended to waive its sovereign immunity. See Princz v. Federal Republic of Germany, 26 F.3d 1166, 1174 ([D.C. Cir.] 1994) ("[A]n implied waiver depends upon the foreign government's having at some point indicated its amenability to suit"); Foremost-McKesson, Inc. v. Islamic Republic of Iran, 905 F.2d 438, 444 (D.C. Cir. 1990) ("courts rarely find that a nation has waived its sovereign immunity . . . without strong evidence that this is what the foreign state intended").

The offer of the reward was made in Peru and was to be administered in Peru by the SHLC. We assume, for purposes of this case, that Vidal, by virtue of his position as Minister of the Interior, had the authority to waive the state's immunity.[26] That said, we are unwilling to hold that Vidal intended to waive Peru's sovereign immunity via the solitary act of telling a person in the United States what he must do to obtain the reward.

Lastly, the evidence bearing on the third nexus had to establish that Peru's actions "in connection with" commercial activity outside the United States caused "a direct effect" within the United States. To be direct, an effect must follow "as an immediate consequence of the defendant's activity." Republic of Arg. v. Weltover, Inc., 504 U.S. 607, 618, 112 S. Ct. 2160, 2168 (1992) (quotation and ellipses omitted). As we have framed it, "the question presented is, 'was the effect sufficiently "direct" and sufficiently "in the United States" that Congress would have wanted an American court to

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[26] Guevara also filed a declaration purporting to show two pieces of evidence that Peru committed acts in the United States in connection with commercial activity in Peru: first, that Vidal traveled to Miami in July 2001, after Montesinos had been apprehended, to personally thank Guevara for his assistance and to confirm that Guevara would receive the reward, and second, that in February 2002, Guevara met in Miami with a Peruvian judge and prosecutor who allegedly had been asked by the then-Minister of the Interior, Fernando Rospigliosi, to tell Guevara that Peru would pay him the reward. Even if we believed that this scant evidence was sufficient to overcome the heavy burden required to show that Peru waived its sovereign immunity (and we do not), Guevara's declaration is a classic unsworn, self-serving statement that would be inadmissible if offered at trial.

hear the case?'" Harris Corp. v. Nat'l Iranian Radio & Television, 691 F.2d 1344, 1351 (11th Cir. 1982) (quoting Tex. Trading & Milling Corp. v. Fed. Republic of Nig., 647 F.2d 300, 313 (2d Cir. 1981)).

In Harris, an American manufacturer of FM transmitters (Harris Corporation) sued to enjoin payment on a letter of credit that an Iranian state bank extended to Harris Corporation as part of a performance guarantee in favor of an Iranian broadcaster. Harris Corporation contended that the letter of credit and associated performance guarantee had been terminated by force majeure—namely, the 1979 Iranian revolution. The guarantee was an integral part of the contract between Harris Corporation and the Iranian broadcaster, and was backed by a standby guarantee that required Harris Corporation to indemnify Continental Bank, which would reimburse the Iranian bank if the latter had to pay on the first letter of credit. Harris Corporation sought to enjoin the Iranian bank's receiving payment from Continental Bank because in the injunction's absence, Harris Corporation would have been obligated to indemnify Continental Bank to the extent it reimbursed the Iranian bank's payment on the original letter of credit. The district court granted the injunction, and, on appeal, the Iranian bank argued that the district court lacked subject matter jurisdiction under the FSIA. In rejecting that argument, this court held that the letter of credit arrangement "extend[ed] into this country, and the appellants' demands thus ha[d] significant . . . financial consequences here," establishing a direct effect for purposes of § 1605(a)(2). Harris Corp., 691 F.2d at 1351.

Here, Guevara presents two ways in which direct effects in the United States flowed from Peru's promise to pay the reward in Peru, neither of which we find persuasive. First, he argues that he accepted the reward offer while in custody in Miami, creating a direct effect in the United States. The record, however, indicates that the extent of Guevara's acceptance-related activity was the alleged, one-off telephone communication between Vidal, Currier, and Longa. In the context of personal jurisdiction, however, we have rejected the argument that one telephone call is sufficient to create minimum contacts with the forum state, see Future Tech. Today, Inc. v. OSF Healthcare Sys., 218 F.3d 1247, 1251 (11th Cir. 2000); cf. Sculptchair, Inc. v. Century Arts, Ltd., 94 F.3d 623, 628 (11th Cir. 1996) (rejecting, as a basis for jurisdiction under Florida's long-arm statute, "a series of telephone conversations" and a one-hour meeting between the Canadian defendant and the plaintiff's Florida office), and we find the same reasoning applicable here. At oral argument, moreover, counsel for Guevara conceded that the primary activity for purposes of § 1605(a)(2)'s analysis was really Peru's failure to make the reward payment within the United States—a sort of "negative activity." We are unaware of any federal court holding that such "negative activity" satisfies the jurisdictional requirements of § 1605(a)(2), and we decline to reach that holding here.

Second, Guevara argues that his arrest in the United States constituted a direct effect in the United States of SHLC's commercial activity in Peru. The FBI arrested Guevara because he was participating in the execution of Montesinos's threats of physical harm to Percovich if Percovich did not handle Montesinos's bank deposits as instructed. Guevara's arrest was "an

immediate consequence" of his criminal activity, not of Peru's offer of a reward for Montesinos's capture. Only after Guevara was arrested and agreed to cooperate with investigators did the availability of reward money come into play.[27]

Neither of Guevara's arguments for a direct effect in the United States reflects Weltover's requirement of immediate consequences or Harris Corp.'s focus on significant financial consequences in the United States. Therefore, we cannot conclude that a direct effect occurred in the United States as a result of Peru's promise to pay the reward money.

III.

Guevara I did not resolve in full the jurisdictional issues presented by 28 U.S.C. § 1605(a)(2). Accordingly, the district court should have determined whether Peru was subject to the court's subject matter jurisdiction because Peru failed to establish that its commercial activity fell under one of the § 1605(a)(2) nexuses for jurisdiction. The court failed to do so. This left us with two possible dispositions: (1) remand the case to the district court with the instruction that it resolve the § 1605(a)(2) issues, or (2) resolve those issues on appeal because the appropriate disposition is clear. We have chosen the latter course. We REVERSE

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[27] We also note Vidal's testimony that neither he nor members of the Peruvian government contacted United States law enforcement officials directly to effectuate Montesinos's capture. The extent of Peruvian involvement with United States law enforcement, Vidal testified, was as part of a request to several intelligence organizations and law enforcement agencies worldwide to assist in the search for Montesinos.

the district court's judgment and REMAND the case with the instruction that the case be dismissed without prejudice.

SO ORDERED.

COX, Circuit Judge, dissenting:

The majority opinion rests on a faulty premise: that, in deciding the prior appeal in this case, this court did not decide whether Peru is entitled to sovereign immunity. The court holds that *Guevara I* decided only the question of whether Peru's offer of the reward constituted commercial activity. But that is incorrect. *Guevara I* held that FSIA's commercial activity exception applies to exempt Peru from the general immunity granted by the statute to foreign sovereigns. 468 F.3d at 1292 ("This appeal presents the issue of whether a foreign state's offer of a reward in return for information enabling it to locate and capture a fugitive falls within the Foreign Sovereign Immunities Act's commercial activity exception to sovereign immunity. For the reasons that follow, we conclude that it does."); *id.* at 1299 ("The question in this appeal is whether Guevara can use the courts of this country to compel Peru to keep its contractual promise to pay him the money it offered.").

The commercial activity exception states:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case–
>
> . . . .

> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States[.]

28 U.S.C. § 1605(a)(2). In deciding that the statutory exception applies to Peru's actions, the *Guevara I* court decided more than that Peru had engaged in commercial activity; the court necessarily decided that a nexus existed between that commercial activity and the United States. It implicitly held that the commercial activity was carried on in the United States, that an act was performed in the United States in connection with commercial activity elsewhere, or that a direct effect of the commercial act was caused in the United States.

Most importantly, the *Guevara I* court explicitly decided that there was no immunity available to Peru under the FSIA. In explaining that the individual defendants were not entitled to sovereign immunity because any such immunity would be derivative of the sovereign state's immunity, the opinion says:

> There is no present need to review the district court's conclusion that the individual defendants were acting within the scope of their authority. Even if they were, they are not

> entitled to sovereign immunity because the sovereign itself is not.

Guevara I, 468 F.3d at 1305 (emphasis added).

Guevara I did not implicitly leave open the question of subject matter jurisdiction, remanding the case for the district court to decide that question. In claiming that it did, the majority opinion takes a statement in the *Guevara I* opinion out of context. *Guevara I* reversed the district court's dismissal of the case on subject matter jurisdiction grounds and remanded the case with the sole instruction that personal jurisdiction over the individual defendants could be examined by the district court. *Id.* at 1305-06. In explaining what the district court had already done and why the district court had not considered the personal jurisdiction arguments of the individual defendants, the *Guevara I* opinion said, "If the court finds that it does not have subject matter jurisdiction, 'the court's sole remaining act is to dismiss the case for lack or jurisdiction.'" *Id.* at 1305 (citations omitted).[28]

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[28] The full section of the opinion containing the quoted statement reads as follows:

> The individual defendants contend that we ought to affirm the judgment dismissing them from the lawsuit anyway, on the ground that the district court lacked personal jurisdiction over them. The district court, having found that they were entitled to sovereign immunity, dismissed their challenge to personal jurisdiction as moot. That result followed from the district court's conclusion that the defendants were immune under the FSIA, which limits the subject matter jurisdiction of the federal courts. 28 U.S.C. § 1604 (stating that if the Act applies, "a foreign state shall be

Contrary to the majority opinion's assertion, the quoted statement is not an indication to the district

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immune from the jurisdiction of the courts of the United States"). "[A] court should inquire into whether it has subject matter jurisdiction at the earliest possible stage in the proceedings." *Univ. of S. Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 410 (11th Cir. 1999). If the court finds that it does not have subject matter jurisdiction, "the court's sole remaining act is to dismiss the case for lack of jurisdiction." *Morrison v. Allstate Indem. Co.*, 228 F.3d 1255, 1261 (11th Cir. 2000).

Because we disagree with the district court that the FSIA bars Guevara's suit, the individual defendants' motion to dismiss for lack of personal jurisdiction is again relevant. However, the district court should have the first opportunity to resolve it. Defendants cite *SEC v. Chenery Corp.*, 318 U.S. 80, 88, 63 S. Ct. 454, 459, 87 L. Ed. 626 (1943), for the proposition that we must affirm the decision of a district court if it reached the correct result but for the wrong reason. The *Chenery* case notes that this rule does not apply "where the correctness of the lower court's decision depends upon a determination of fact." *Id.* Our own decisions are to the same effect. *See Pacheco de Perez v. AT&T Co.*, 139 F.3d 1368, 1372 n.5 (11th Cir. 1998) ("We are mindful of the general rule that a court of appeals will not consider issues not reached by the district court, especially where the issues involve questions of fact."); *Stewart v. Dep't of Health and Human Servs.*, 26 F.3d 115, 115-16 (11th Cir. 1994) (same). The "minimum contacts" prong of the personal jurisdiction inquiry is necessarily case and fact specific. We decline to take up that issue without the benefit of factfindings from the district court. Vidal and Rospigliosi may reassert on remand the issue of the district court's jurisdiction over their persons.

Guevara I, 468 F.3d at 1305-06.

court that, on remand, it should reconsider subject matter jurisdiction.

Guevara I's holding that the commercial activity exception to sovereign immunity applies to Peru's activities is a holding that subject matter jurisdiction exists over this case pursuant to the FSIA. That is the law of this case, notwithstanding the fact that the *Guevara I* opinion did not explicitly address the nexus between Peru's commercial activities and the United States. *See EEOC v. Int'l Longshoremen's Ass'n*, 623 F.2d 1054, 1058 (5th Cir. 1980) (noting that the law of the case doctrine applies to "things decided by necessary implication as well as those decided explicitly.") (quotation and citation omitted); *Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (adopting as precedent decisions of the Former Fifth Circuit handed down prior to the close of business on September 30, 1981). The district court did not err in so finding, and this panel cannot properly revisit the question. *See Free v. Abbott Labs., Inc.*, 164 F.3d 270, 272-273 (5th Cir. 1999)[29] (joining other circuits in refusing to recognize a "jurisdiction exception" to the law-of-the-case doctrine; explaining that although a federal court must examine each case to determine whether it has subject-matter jurisdiction, this does not require "perpetual re-examination of precisely the same issue of subject matter jurisdiction"); *see also McKesson Corp. v. Islamic Republic of Iran*, 52 F.3d 346, 350 (D.C. Cir.1995) (applying the law-of-the-case doctrine to a prior appeals panel's ruling concerning the existence

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[29] Affirmed by an equally divided court, 529 U.S. 333, 120 S. Ct. 1578 (2000).

of subject matter jurisdiction); *Hanna Boys Center v. Miller*, 853 F.2d 682, 686 (9th Cir. 1988) (same).

Although I disagree with the majority's conclusion that the FSIA bars Guevara's suit, I have reservations about the propriety of resolving this dispute in the courts of this country. Dismissal pursuant to the discretionary doctrine of international comity, rather than dismissal for want of jurisdiction, may be the appropriate way to dispose of this case.[30] The Peruvian government created the reward and the Special High Level Committee charged with administering the reward. After considering Guevara's claim to the reward, the Committee rejected his claim. I suspect it would violate international comity for United States courts to review that decision.

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[30] International comity is an abstention doctrine. "A federal court has jurisdiction but defers to the judgment of an alternative forum." *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1237 (11th Cir. 2004) (citing *Turner Entm't Co. v. Degeto Film*, 25 F.3d 1512, 1518 (11th Cir. 1994)).

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION

CASE NO. 04-23223-CIV-COOKE/BANDSTRA

[Filed September 9, 2008]

JOSE GUEVARA,	)
	)
Plaintiff,	)
	)
v.	)
	)
REPUBLICA DEL PERU, *et al.*,	)
	)
Defendants.	)
	)

ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO COUNTS I AND II OF THE COMPLAINT AND DENYING DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

This matter is before me on Plaintiff's Motion for Partial Summary Judgment as to Counts I and II of the Complaint [D.E. 119] and the Peruvian Government's Cross Motion for Summary Judgment [D.E. 203]. Plaintiff's Motion for Partial Summary Judgment is granted as there are no genuine issues of

fact regarding whether Plaintiff Jose Guevara ("Guevara") enabled Montesino's capture.

I. BACKGROUND

This is a lawsuit to collect a $5,000,000.00 reward offered by Defendant Peru ("Peru") in exchange for information leading to the capture and arrest of an international fugitive, Vladimiro Lenin Montesinos Torres ("Montesinos"). Guevara alleges that he accepted the reward by providing Peru with accurate information and assistance that led to the location and capture of Montesinos under the terms of Peru's offer. Guevara, however, was never paid the reward.

Montesinos served as presidential adviser and head figure of the National Intelligence System of Peru during the 1990s. During that time, Montesinos organized a net of corruption covering a wide spectrum of illicit activities, including arms trafficking, drug dealing, money laundering, extortion, and murder. After a public corruption scandal led to a change in Peru's government, Montesinos went into hiding in October 2000. In April 2001, Peru enacted Emergency Decree No. 049-2001. Under the Decree, Peru offered a reward of $5,000,000.00 to anyone who could provide information enabling the location and capture of Montesinos. In December 2000, the United States Ambassador to Peru contacted Special Agent Kevin Currier ("Currier") and communicated Peru's request for the Federal Bureau of Investigations' ("FBI") assistance in locating and apprehending Montesinos.

Since December 16, 2000, Guevara had been providing private security and shelter to Montesinos in Venezuela. In June 2001, Guevara traveled to Miami,

Florida to attend a meeting on behalf of Montesinos. On June 22, 2001, while in Miami, Guevara was taken into custody by FBI agents. After Guevara was taken into custody in Miami, and upon learning of Guevara's willingness to cooperate with the FBI to apprehend Montesinos, Special Agent Currier formulated a plan for the capture of Montesinos. On June 23, 2001, Currier met with Peru's then Minister of the Interior, Antonio Ketin Vidal ("Ketin Vidal") regarding the search for Montesinos. Currier informed Ketin Vidal of Guevara's capture and of his willingness to cooperate in locating Montesinos and delivering him to Peruvian authorities. Currier and Ketin Vidal reached agreement on a plan for using Guevara's cooperation to have Montesinos delivered to the Peruvian ambassador's residence in Caracas, Venezuela. This plan included offering Guevara the $5,000,000.00 reward offered by Peru for information resulting in the location and capture of Montesinos. Ketin Vidal subsequently informed Currier that he had spoken with Peru's interim President, Valentin Paniagua, who approved the operation, including the reward offer to Guevara.

On Currier's instructions, and with Ketin Vidal's express approval, Special Agents Longa and Bob Jones relayed the offer to Guevara in Miami. FBI Special Agent Waldo Longa informed Guevara that if he agreed to help the FBI locate and apprehend Montesinos, he would be released, all charges against him would be dropped, and he would be eligible for the $5,000,000.00 reward offered by Peru. Upon learning of the reward offer, Guevara provided the FBI with information on Montesinos's whereabouts. Guevara also made telephone calls (monitored by the FBI on Peru's behalf) to his compatriots in Venezuela to

coordinate Montesinos's delivery into custody. Guevara contends that, as a result of his cooperation, Montesinos was captured and arrested by Venezuelan authorities on the evening of June 23, 2001.

Ketin Vidal traveled to Miami, Florida, and requested a meeting with Guevara. On July 10, 2001, Guevara met with Ketin Vidal, Alfredo Ferreiro (then Consul General of Peru in Miami), and Special Agent Longa in Miami. Guevara alleges that, during the meeting, Ketin Vidal thanked Guevara on behalf of Peru for providing the information and assistance that enabled Montesinos' location and capture. Guevara also alleges that, during this meeting, Ketin Vidal reaffirmed Peru's commitment to pay Guevara the reward in Miami, Florida.

In February 2002, Guevara met with Magali Bascones, a Peruvian judge, in Miami. Judge Bascones flew to Miami and met with Guevara at the FBI's Miami South Division offices. Jose Ugaz, the prosecutor assigned to the Montesinos public corruption investigation in Peru, also attended this meeting. Both Bascones and Ugaz allegedly told Guevara that Fernando Rospigliosi, then Peru's Minister of the Interior, had asked them to tell Guevara that Peru would pay him the $5,000,000.00 reward. According to Guevara, Special Agent Currier subsequently followed up with a number of Peruvian officials, each of whom assured Currier that Ketin Vidal had acknowledged that Guevara was entitled to the reward.

In a Resolution dated August 5, 2002, the Special Committee in Peru created by the Emergency Decree to administer the reward stated:

WHEREAS:

On June 23, 2001 Venezuelan national Jose Guevara provided information leading to the location and capture of Vladimiro Lenin Montesinos Torres to the Chair of the Special High Level Committee of the Department of Homeland Security at the time, PNP Lieutenant General Antonio Ketin Vidal Herrera for the purpose of receiving the financial reward stipulated in Emergency Decree No. 049-2001:

Mr. Jose Guevara made his request by and through his attorney, set forth in briefs sent to this Committee on February 6 and 19, 2002;

The request made by Mr. Jose Guevara is in keeping with the procedure stipulated in Emergency Decree No. 049-2001, issued on April 16, 2001;

The Special High Level Committee of the Department of Homeland Security must decide the request made by Mr. Jose Guevara base [sic] on the analysis of the facts set forth in his request;

DECIDES:

To authorize processing of the request filed by Mr. Jose Guevara for evaluation by the Special High Leval Committee of the Department of Homeland Security.

As of today, Peru has not paid Guevara.

II. LEGAL STANDARD

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with

the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). According to the U.S. Supreme Court, "the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "The moving party bears the initial burden to show the district court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial. . . [o]nly when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). Rule 56(e) "requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324. Thus, the nonmoving party "'may not rest upon the mere allegations or denials of his pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial.'" *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1984) (stating"[w]hen the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts"). The Court, however, must view the evidence in the light most favorable to the nonmoving party, and summary

judgment is inappropriate where a genuine issue of material fact remains. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). Furthermore, the court may not weigh conflicting evidence to resolve disputed factual issues; if a genuine dispute is found, summary judgment must be denied. *Skop v. City of Atlanta, GA*, 485 F.3d 1130, 1140 (11th Cir. 2007) (citing *Carlin Commc'n, Inc. v. S. Bell Tel. & Tel. Co.*, 802 F.2d 1352, 1356 (11th Cir. 1986)).

III. DISCUSSION

A. There Are No Genuine Issues of Material Fact for Trial

The parties agree that Peru's offer of a reward in exchange for information was an offer to enter into a unilateral contract. *See Ballou v. Campbell*, 179 So. 2d 228, 229 (Fla. 2d DCA 1965) ("A unilateral contract is one in which no promisor receives a promise as consideration for his promise."). The only consideration necessary in a unilateral contract is the offeree's performance. *Id.* Once the offeree performs, the offeree has accepted the offer, thereby creating a contract that binds the offeror. *Id.* Peru's Emergency Decree No. 049-2001 offered a reward of $5,000,000.00 for information enabling the location and capture of Montesinos. All that remained for completion of the contract was for someone to perform the terms of the offer by providing such information. Guevara argues that the Emergency Decree constituted a unilateral offer that became a completed contract upon Guevara's delivery of information and cooperation in the capture of Montesinos. As evidence that he delivered information that enabled Peru to locate and capture Montesinos, Guevara points to the August 5, 2002

Resolution and the sworn declaration of Special Agent Currier. Peru, on the other hand, argues that the Resolution only authorizes the processing of Guevara's claim and that Currier's declaration is not entirely based on personal knowledge.

The August 2002 Resolution supports the entry of summary judgment in favor of Guevara as it declares that Guevara provided information leading to the location and capture of Montesinos. Peru attempts to read ambiguities into the Resolution by arguing that it only authorizes the processing of Guevara's claim. It further argues that, because the Special Committee is only authorizing the processing of the claim, it could not have already analyzed the facts underlying the claim. The plain language of the Resolution makes it clear, however, that the Special Committee had already found that Guevara provided information leading to the location and capture of Montesinos and was only determining whether to pay him.

Furthermore, Currier's declaration establishes that Guevara provided the information Peru needed to capture Montesinos. Peru's claims that the declaration is not based on personal knowledge is unfounded. Currier begins his declaration by stating that, in December 2000, the United States Ambassador to Peru personally contacted him and requested the F.B.I's assistance in locating and apprehending Montesinos. Currier Decl. at 1-2. In early June 2001, Currier learned that agents Longa and Jones had arrested Guevara on June 22, 2001 and that Guevara agreed to cooperate with the agents to apprehend Montesinos. *Id.* at 2. Currier further declares that he, along with the Miami agents, formulated a plan to capture Montesinos who, Guevara told them, was hiding in

Caracas, Venezuela. *Id.* The following day, Currier, accompanied by the United States Embassy's Charge d'Affaire, met with Ketin Vidal to discuss the search for Montesinos. *Id.* During that Meeting, Currier proposed to Ketin Vidal that Guevara's associates in Venezuela deliver Montesinos to Peru's embassy in Venezuela. Ketin Vidal proposed instead that Guevara's men deliver Montesinos to the Peruvian amabassador's residence in Caracas. *Id.* at 3. Currier and Ketin Vidal also discussed putting the $5,000,000.00 reward on the table for Guevara and his group so long as Guevera provided information leading to the location and capture of Montesinos. *Id.* With Ketin Vidal's express approval, Currier contacted Special Agents Jones and Longa in Miami and asked them to inform Guevara that, in exchange for his cooperation, Peru would offer him the $5,000,000.00 reward. *Id.* In response, Guevara provided the information and assistance that led to Montesinos's capture and arrest by Venezuelan authorities the evening of June 23, 2001. *Id.*

Peru has not provided any evidence to dispute the Resolution and Currier's declaration and, therefore, has not created a genuine issue of fact as to how Montesinos was captured. In defending against this motion, Peru rests solely on their representation that Montesinos was captured by Venezuelan authorities. Peru does not even explicitly contend that the Venezuelan authorities captured Montesinos with information obtained through another source other than Guevara. Under the decree, however, Guevara did not have to deliver Montesinos to Peru to receive the award. Guevara only had to provide information leading to his capture. Venezuela's capture of Montesinos does not, therefore, defeat Guevara's

entitlement to the award. In the absence of evidence to the contrary, it appears that Venezuela learned of Montesinos's location from Guevara and would have been unable to capture him had Guevara not cooperated.

Ketin Vidal's and Rospigliosi's depositions are not inconsistent with Guevara's version of what transpired between the parties. Neither Ketin Vidal's nor Rospigliosi's deposition testimony establish that Venezuela captured Montesinos without the information provided by Guevara. Rospigliosi merely states that he does not know whether Peru knew Montesinos's whereabouts independent of Guevara and that he believed that Guevara's petition for the reward did not have merit. Rospigliosi Dep. at 50-51. Rospigliosi explains that Guevara's petition did not have merit because the Venezuelan government captured Montesinos. *Id.* at 52. Again, without explaining the source of the Venezuelan government's information regarding Montesinos's location, it appears that Venezuela learned of Montesinos's location from Guevara.

At his deposition, Ketin Vidal denies having ever met with or spoken to the FBI in Peru or Miami about the reward offer. He does, however, admit to meeting with two officials of the U.S. Embassy in Lima on June 23, 2001 regarding the search for Montesinos. Statement of Material Facts in Dispute of the Republic of Peru and Ministry of Interior of Peru at 2. This is the same day that Currier alleges he met with Ketin Vidal. It, therefore, appears that Ketin Vidal met with Agent Currier from the FBI, but was merely under the impression that Currier was an official of the U.S. Embassy in Lima. Ketin Vidal also testified that he

learned of Montesinos's capture through the statements made by Hugo Chavez, President of Venezuela. This statement does not show that Guevara did not provide the information that Venezuela used to locate Montesinos. Accordingly, Peru has not brought forth evidence to show that there exists a genuine issue of fact regarding whether Guevara provided the information that led to the location and capture of Montesinos.

The other two pieces of evidence provided by Peru also fail to establish that Venezuela captured Montesinos without Guevara's assistance. Peru points to the Notice of Decision of the High Level Special Committee and to the Declaration of Ginocosta Santoalla ("Santoalla") as evidence that Montesinos was captured without Guevara's help. In his declaration, Santoalla merely concludes that Guevara misinterprets the terms of the Resolution and that, on the record of the Special Committee, the arrest by Venezuelan officials was an event independent of Guevara's conduct. Santoalla's declaration is conclusory. It does not state what evidence was before the Special Committee showing that Venezuela knew where Montesinos was located independent of Guevara. The Special Committee's Notice of Decision suffers from the same infirmity. The Notice merely states that "it was unanimously resolved to deny your request for financial compensation . . . inasmuch as the requirements set in said legal norm for granting the aforesaid compensation were not met." The Notice further states: "We emphasize that all the information related to the application of said Emergency Decree is secret, and those who violate this provision as provided in Article 6th of same, are subject to administrative, civil and/or criminal liability . . . ." Peru has

conveniently made the information related to the application of the decree secret so that no one could ever determine whether Guevara's information led to Montesinos's capture. Peru then states that Montesinos was captured by Venezuelan authorities and Guevara is supposed to take their statement at face value. In order to avoid summary judgment, however, Peru has to show that the Venezuelan authorities captured Montesinos without help from Guevara. As Peru has failed to do so, I am granting summary judgment in favor of Guevara on Counts I and II of the Complaint.

B. Awarding Guevara the Reward Does Not Violate Public Policy

The Eleventh Circuit has already considered the public policy issues in this case and has determined that, if Guevara is entitled to the reward, he should be paid. In *Guevara v. Republic of Peru*, 468 F.3d 1289, 1303-1304 (11th Cir. 2006), the Court stated:

> Anything that makes it easier for countries to welch on their promises to pay for information decreases the real value of any reward they offer and makes it less likely that an offer will be accepted. As Guevara has learned up to this point in the litigation, the promise of a multimillion dollar reward means little or nothing to an informant if the country offering the reward cannot be made to pay it. The holding Peru asks us to reach would jeopardize not only its vital interests but those of every country that offers rewards for information, including this country.

Peru knew, at the time of contracting, the source of Guevara's information. It should not now, after having received information regarding Montesinos, be allowed to use Guevara's association with Montesinos as a way to get out of paying the cost of its bargain with Guevara.

C. The Eleventh Circuit Has Already Determined My Jurisdiction in This Case

The Foreign Sovereign Immunities Act ("FSIA") provides the sole basis for obtaining subject matter jurisdiction over a foreign sovereign in the United States. *Guevara v. Republic of Peru*, 468 F.3d 1289, 1294 (11th Cir. 2006). I initially concluded that the FSIA barred Guevara's suit. The Eleventh Circuit explicitly disagreed with me, stating: ". . . we disagree with the district court that the FSIA bars Guevara's suit . . . ." *Id.* at 1305. Accordingly, my jurisdiction in this case has been established.

IV. CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Partial Summary Judgment as to Counts I and II of the Complaint [D.E. 119] is granted and the Peruvian Government's Cross Motion for Summary Judgment [D.E. 203] is denied.

DONE AND ORDERED in Miami, Florida, this 9th day of September 2008.

/s/ Marcia G. Cooke
MARCIA G. COOKE
United States District Judge

cc:

All counsel of record

APPENDIX C

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-16235

D. C. Docket No. 04-23223-CV-MGC

[Filed November 1, 2006]

JOSE GUEVARA,	)
	)
Plaintiff-Appellant,	)
	)
versus	)
	)
REPUBLIC OF PERU,	)
MINISTERIO DEL INTERIOR,	)
ANTONIO KETIN VIDAL,	)
FERNANDO ROSPIGLIOSI,	)
	)
Defendants-Appellees.	)
	)

Appeal from the United States District Court
for the Southern District of Florida

(November 1, 2006)

Before TJOFLAT, CARNES and HILL, Circuit Judges.

CARNES, Circuit Judge:

This appeal presents the issue of whether a foreign state's offer of a reward in return for information enabling it to locate and capture a fugitive falls within the Foreign Sovereign Immunities Act's commercial activity exception to sovereign immunity. For the reasons that follow, we conclude that it does.

I.

Vladimiro Lenin Montesinos Torres served as an advisor to Peruvian President Alberto Fujimori and as the head of Peru's National Intelligence System during the 1990s. (Compl. ¶ 8). He is currently in the midst of a series of corruption trials in that country. The allegations are that Montesinos committed a host of crimes while he was in office, including arms trafficking, drug dealing, money laundering, extortion, and more than a few murders. Id. According to declassified documents from the United States Southern Command, the nerve center responsible for this country's military operations in Latin America, Montesinos has "been compared variously to such sinister figures as Rasputin, Darth Vadar, Torquemada and Cardinal Richelieu." United States Southern Command, Information Paper (Jan. 6, 1997). The picture is one of a man who has never been troubled by anything resembling a moral scruple, and the facts about how he was brought to justice form the stage on which this lawsuit plays.

For decades journalists and politicians had been leveling accusations of corruption against Montesinos, but for a long time none of them stuck. Things began to change on the evening of September 14, 2000, when an opposition lawmaker aired on Peruvian national television a video showing Montesinos handing a bribe to a congressman-elect. See Clifford Krauss, Fujimori's Fall, N.Y. Times, Dec. 3, 2000, § 1, at 1.[1] That alone might not have done him in, but as it turned out Montesinos was like a serial killer who relishes the opportunity to relive his crimes—he had videotaped many of his dirty deeds. Id. Peruvian authorities seized from Montesinos more than 700 videotapes incriminating him in a host of crimes. See Jane Holligan, Bribes, Lies, and Videotape in Peru, Bus. Week Online, Feb. 2, 2001. On September 16, 2000, President Fujimori, facing public pressure, announced that he was dissolving the intelligence agency and that he would step down after holding new elections. See N.Y. Times, supra.

Jail time seemed imminent for Montesinos, but the former spy chief was also something of a magician. Over the years he had managed to make many of his enemies, including journalists, disappear, and he had one more magic act up his sleeve. Thomas Catan, The

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[1] Because this is an appeal from a Federal Rule of Civil Procedure 12(b)(1) dismissal, the operative facts are those alleged in the complaint. Lawrence v. Dunbar, 919 F.2d 1525, 1529 (11th Cir. 1990). In this section of the opinion, where outside sources are cited, we have drawn some additional details from them to flesh out the story. Those details, which are entirely consistent with the complaint's allegations, are not essential to our decision. At least at this stage, the parties are at loggerheads over the law, not the facts.

Sins of Montesinos, The Fin. Times Mag., July 26, 2003, at 15. In October 2000, Montesinos slipped out of the country on a yacht bound for the Galapagos Islands, sailed on to Venezuela, and visited a plastic surgery clinic. Then he vanished. Id.

An international manhunt ensued. In November of 2000, Peru appointed a special prosecutor to investigate the intelligence system's net of corruption and to see that those involved were convicted and punished. (Compl. ¶ 11) The same month the prosecutor issued national and international arrest warrants for Montesinos. Id. Antonio Ketin Vidal, the Minister of the Interior of Peru, worked with international police agencies to coordinate the search. Id. Despite a media frenzy, the trail quickly grew cold. Fin. Times Mag., supra.

Peru needed to generate new leads. To do so, Interim President Valentin Corazao issued Emergency Decree No. 049-2001, which established a five million dollar reward for accurate information enabling the authorities to locate and capture Montesinos. (Compl. ¶ 12). Article One of that decree provided that Peru thereby:

> Establish[ed] a financial reward in the amount of US $5,000,000.00 (FIVE MILLION 00/100 UNITED STATES DOLLARS), which shall be given to the person or persons who provide(s) accurate information that will directly enable locating and capturing Vladimiro Lenin Montesinos Torres. In the event several persons provide the said information, the financial reward shall be divided among them.

(Compl. Ex. A). Article Three of the decree defined "accurate information":

> For purposes of this Emergency Decree, accurate information shall be that [information] provided through any means to the Special High Level Committee and which enables locating and capturing Vladimiro Lenin Montesinos Torres, who is wanted.

Id. (bracketed word in original)

Enter the plaintiff. Jose Guevara had met Montesinos in Venezuela in mid December 2000. (Compl. ¶ 15). Montesinos needed a safe-house, and Guevara agreed to provide it. Id. Guevara also provided Montesinos with a security detail, which gave him complete knowledge of the fugitive's whereabouts. (Compl. ¶¶ 15-16).

Guevara was easier to track down than Montesinos. In June 2001, F.B.I. agents located and detained Guevara in Miami. (Compl. ¶¶ 17-18). The agents told him that the United States intended to pursue criminal charges against him unless he gave up Montesinos. (Compl. ¶ 18). They also reminded Guevara of Peru's reward offer. Id. Faced with a choice of jail time and loyalty to Montesinos or five million dollars and freedom, it did not take Guevara long to make up his mind.[2] Guevara not only disclosed

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[2] The apparent ease with which Guevara made the choice to betray Montesinos brings to mind the epitaph an owner put on the tombstone of his departed canine companion: "[O]ne might have thought he was human, but he was loyal." Chiseled Farewells, Harv. Mag., Nov. – Dec. 2002, at 15 (quoting an epitaph on the

Montesinos' hiding place and telephone number but also arranged to have him delivered into the hands of the Venezuelan intelligence agency. (Compl. ¶ 22). Montesinos was arrested as a result of the information Guevara provided and the assistance he rendered, but for reasons that it has not disclosed in this case Peru has refused to pay him the promised reward. (Compl. ¶ 1).

II.

Guevara filed this lawsuit in the Eleventh Judicial Circuit of Florida, and it was removed under 28 U.S.C. § 1441(d) to the United States District Court for the Southern District of Florida. The lawsuit claims breach of contract, breach of contract implied in law, fraudulent inducement, and fraudulent misrepresentation. The named defendants include The Republic of Peru; its Ministry of the Interior; Antonio Ketin Vidal, who was the Minister of the Interior at the time of these events; and Fernando Rospigliosi, who succeeded Vidal in that office. The Republic of Peru and the Ministry of the Interior filed a motion to dismiss, contending that they are immune under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1602–11. Vidal and Rospigliosi filed a motion to dismiss contending that as agents of the Republic of Peru they are likewise entitled to sovereign immunity. The two individual defendants also asserted that the district court lacked personal jurisdiction over them.

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tombstone of a dog named Pompey, buried in the animal cemetery in London's Hyde Park).

In an order entered on October 6, 2005, the district court concluded that Peru's actions did not fit under any exception to the FSIA and therefore both the nation and its Ministry of the Interior were entitled to sovereign immunity. On October 14, 2005, the court entered another order concluding that Peru's sovereign immunity protected the two individual defendants, who had been acting in their official capacity. On those bases, the court dismissed the complaint for lack of jurisdiction and denied all other pending motions as moot.

Guevara appealed the judgment dismissing his complaint. The individual defendants, in addition to urging that we affirm the dismissal on the grounds stated by the district court, have also pressed their position that the district court lacked personal jurisdiction over them.

III.

A.

The Foreign Sovereign Immunities Act provides the sole basis for obtaining subject matter jurisdiction over a foreign sovereign in the United States. Beg v. Islamic Republic of Pakistan, 353 F.3d 1323, 1324 (11th Cir. 2003). The Act provides a general grant of immunity for foreign governments, 28 U.S.C. § 1604, subject to specific statutory exceptions. The one at issue in this case is the commercial activity exception. 28 U.S.C. § 1605(a)(2). It provides that:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case– . . . (2) in which the

> action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

Id.

Peru contends, and the district court agreed, that offering a reward for capturing a fugitive involves uniquely sovereign objectives, and for that reason does not constitute a commercial activity. Guevara responds that the dispositive issue is whether private actors could similarly offer a reward for information leading to the capture of a fugitive. They can, he says, and it follows that the activity is "commercial" as that term is used in the Act.

B.

To decide this issue we need to mark the boundaries of the "commercial activity" exception as it is used in the FSIA. Examining the text of the Act helps some. It says that "commercial activity" is:

> either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

28 U.S.C. § 1603(d). The Supreme Court has noted that this definition "leaves the critical term 'commercial' largely undefined." Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 612, 112 S. Ct. 2160, 2165 (1992). The problem is that the first sentence "simply establishes that the commercial nature of an activity does not depend upon whether it is a single act or a regular course of conduct; and the second sentence merely specifies what element of the conduct determines commerciality." Id.

The Supreme Court, going beyond the statutory explanation, also determined in Weltover that the FSIA in general, and its commercial exception in particular, "largely codifies the so-called 'restrictive' theory of foreign sovereign immunity." Id. Under the restrictive theory immunity should be granted "only with respect to causes of action arising out of a foreign state's public or governmental actions." Alfred Dunhill v. Republic of Cuba, 425 U.S. 682, 698, 96 S. Ct. 1854, 1863 (1976). By contrast, sovereign immunity does not apply to a foreign state's "commercial and private activities." Id. To understand what this means we turn to an examination of the historical development of sovereign immunity law in this country, mindful of Holmes' advice that in order to know what the law is we must know what it has been and is becoming.[3]

The FSIA is only thirty years old, but the view of sovereign immunity that it embodies is much older.

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[3]See Oliver Wendell Holmes, Jr., The Common Law 1 (Boston, Little, Brown & Co. 1881) ("In order to know what it is, we must know what it has been, and what it tends to become. . . . The history of what the law has been is necessary to the knowledge of what the law is.").

Originally, the United States recognized only a limited form of sovereign immunity. David J. Bederman, Admiralty and the Eleventh Amendment, 72 Notre Dame L. Rev. 935, 939–40 (1997). More than two centuries ago a federal court applied an exception to foreign sovereign immunity where the foreign power's actions have a "commercial character." Ellison v. The Bellona, 8 F. Cas. 559, 559 (D.S.C. 1798). Early Supreme Court decisions similarly noted that "a clear distinction is to be drawn between the rights accorded to private individuals or private trading vessels, and those accorded to public armed ships which constitute a part of the military force of the nation." The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 143 (1812); see also The Santissima Trinidad, 20 U.S. (7 Wheat.) 283, 353 (1822).

This dichotomy between public and sovereign versus private and commercial fits the original figure Chief Justice Marshall used to explain the principle underlying the commercial exception to immunity—that of a sovereign "descending" to the level of a private individual. See Bank of the United States v. Planters' Bank of Ga., 22 U.S. (9 Wheat.) 904, 907 (1824) ("It is, we think, a sound principle, that when a government becomes a partner in any trading company, it devests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted."). A state not acting in its unique role as sovereign is akin to a private citizen or merchant.

Although Schooner Exchange anticipated exceptions to immunity for private commercial activity, by the 1920s the decision had nonetheless "c[o]me to be regarded as extending virtually absolute immunity to foreign sovereigns." Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480, 486, 103 S. Ct. 1962, 1967 (1983); see, e. g., Berizzi Bros. Co. v. S.S. Pesaro, 271 U.S. 562, 571, 46 S. Ct. 611, 611 (1926). Over the next two decades, the Court shifted to a policy of deference toward the executive branch. See, e.g., Republic of Mexico v. Hoffman, 324 U.S. 30, 34, 65 S. Ct. 530, 532 (1945) ("Chief Justice Marshall introduced the practice, since followed in the federal courts, that their jurisdiction in rem . . . will be surrendered on recognition . . . of the asserted immunity by the political branch of the government charged with the conduct of foreign affairs . . ."); Ex parte Republic of Peru, 318 U.S. 578, 588, 63 S. Ct. 793, 799 (1943) (same); Compania Espanola de Navegacion Maritima, S.A. v. The Navemar, 303 U.S. 68, 74, 58 S. Ct. 432, 434 (1938) (same). This deferential approach did not change the existing practice of granting sovereign immunity in virtually all cases where it was claimed, because the executive regularly requested that the courts grant immunity to all friendly foreign sovereigns. Verlinden, 461 U.S. at 486, 103 S. Ct. at 1968.

In 1952 the State Department changed the executive's policy to one embodying the restrictive theory of sovereign immunity. The department first signaled this shift in policy in a letter from Jack B. Tate, Acting Legal Adviser, United States Dept. of State, to Philip B. Perlman, Acting Attorney General. (May 19, 1952), as reprinted in 26 Dept. of State Bull. 984–85 (1952). Tate wrote in part:

> A study of the law of sovereign immunity reveals the existence of two conflicting concepts of sovereign immunity, each widely held and firmly established. According to the classical or absolute theory of sovereign immunity, a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign. According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (jure imperii) of a state, but not with respect to private acts (jure gestionis). . . . it will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity.

Id.; see also Alfred Dunhill, 425 U.S. at 698, 96 S. Ct. at 1863 (explaining that the position taken in the Tate Letter became the official policy of the United States government). This new restrictive approach also required the State Department to make case-specific immunity recommendations for each lawsuit against a foreign state, and that proved problematic. See Verlinden, 461 U.S. at 487, 103 S. Ct. at 1968. Congress resolved this problem, at least for the executive branch, by enacting the FSIA, shifting the burden of making immunity determinations to the judicial branch. 28 U.S.C. § 1602 (stating that the determination of immunity by the courts would "serve the interests of justice").

Although the FSIA transferred the job of making initial immunity determinations from the State Department to the United States courts, it retained

the restrictive theory of immunity. The House Report accompanying the bill that was ultimately enacted explained that:

> the bill would codify the so-called "restrictive" principle of sovereign immunity, as presently recognized in international law. Under this principle, the immunity of a foreign state is "restricted" to suits involving a foreign state's public acts (jure imperii) and does not extend to suits based on its commercial or private acts (jure gestionis).

H.R. Rep. No. 94-1487, at 6 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6605.

The case law governing foreign sovereign immunity and the legislative history of the FSIA both treat commercial and private activity as outside the bounds of sovereign immunity. See, e.g., Alfred Dunhill, 425 U.S. at 698, 96 S. Ct. at 1863 ("commercial and private activities . . . do not give rise to sovereign immunity"); The Schooner Exchange, 11 U.S. (7 Cranch) at 143 ("[A] clear distinction is to be drawn between . . . private individuals or private trading vessels, and . . . public armed ships."); H.R. Rep. No. 94-1487, at 6 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6605 ("[T]he immunity of a foreign state is 'restricted' to suits involving a foreign state's public acts (jure imperii) and does not extend to suits based on its commercial or private acts (jure gestionis)."). Commercial activities and private activities are often spoken of together and in a way that distinguishes them from sovereign or public acts. See, e.g., Weltover, 504 U.S. at 613, 112 S. Ct. at 2166 (noting "the distinction between state sovereign acts, on the one

hand, and state commercial and private acts, on the other"); Letter from Jack B. Tate, Acting Legal Adviser, Dept. of State, to Philip B. Perlman, Acting Attorney General (May 19, 1952), as reprinted in 26 Dept. of State Bull. 984–85 (1952) ("[t]he immunity of the sovereign is recognized with regard to sovereign or public acts (jure imperii) of a state, but not with respect to private acts (jure gestionis)."); H.R. Rep. No. 94-1487, at 6 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6605.

It is against this historical and legislative backdrop that the Weltover court announced the rule for determining whether an activity is commercial: "[W]hen a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are 'commercial' within the meaning of the FSIA." 504 U.S. at 614, 112 S. Ct. at 2166. The Court explained:

> [B]ecause the Act provides that the commercial character of an act is to be determined by reference to its "nature" rather than its "purpose," 28 U.S.C. § 1603(d), the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in "trade and traffic or commerce," Black's Law Dictionary 270 (6th ed. 1990)

Id.

Our first extended discussion of the Weltover decision came in Honduras Aircraft Registry, Ltd. v. Gov't of Honduras, 129 F.3d 543 (11th Cir. 1997), where we stated that a "foreign state loses its immunity if it engages in commercial activity . . . because then it is exercising the same powers that a private citizen might be exercising." Id. at 548. We read Weltover to mean that "[a] foreign state is commercially engaged when it acts like an ordinary private person, not like a sovereign, in the market." Id.

The Honduras case involved a contract entered into by that country and the plaintiff, a corporation founded by two businessmen with airline experience, for the provision of goods and services Honduras needed to upgrade and modernize its civil aeronautics program. Id. at 545. The plaintiffs' responsibilities included establishing a database containing information that Honduras needed to admit airplanes to its registry. Id. When its leadership changed, Honduras abrogated the contract. After being haled into a United States court by the plaintiff, Honduras invoked sovereign immunity, arguing that the registration of aircraft is a sovereign act. Id. at 546.

While we agreed with Honduras that "registering aircraft under the Honduras flag is an act peculiar to its sovereignty," we nonetheless concluded that its contracting for services was a commercial act. Id. at 548. As we explained, "[a]pparently Honduras did not have the resources or the technical expertise to conduct its own aircraft inspections or to set up a registry," so it "ventured into the marketplace to find the expertise and resources needed to accomplish those tasks." Id. at 547. The plaintiffs did not contend that the contract gave them the right to register aircraft or

force Honduras to do so, but instead took the position that they had contracted to provide services in connection with registration and were bringing suit to enforce that contract. Id. at 548. We agreed, because "[a]ll of those underlying activities were commercial in nature and of the type negotiable among private parties." Id. at 547.

C.

The location and capture of a fugitive by law enforcement officials of a country may be a sovereign act, but that is not what this case is about. Peru's contractual offer of a reward did not promise that in return for the information it was seeking Peru would locate and capture Montesinos, and Guevara is not seeking to compel it to do so. All that Guevara is seeking is what Peru promised in the reward offer, which is that it would pay five million dollars to anyone who furnished information of the nature and quality that enabled Peru to capture Montesinos. The information that Guevara provided fit the requirements of the offer: it enabled Peru to capture Montesinos. The question in this appeal is whether Guevara can use the courts of this country to compel Peru to keep its contractual promise to pay him the money it offered.

The facts here are similar enough to those in the Honduras case to compel the same result. Just as Honduras could have attempted to develop its aircraft database in-house without offering money for the assistance of anyone outside the government, Peru could have attempted to use its police and investigatory powers to search for Montesinos without offering money for information from anyone outside

the government. However, Peru "did not have the resources or the . . . expertise," Honduras, 129 F.3d at 547, it needed to get the job done. After the trail ran cold, Peru "ventured into the marketplace," id., to buy the information needed to get its man. Id. Guevara provided that information for a price, the price being the five million dollars that Peru had offered to pay for it. The underlying activity at issue—the exchange of money for information—is "commercial in nature and of the type negotiable among private parties." Id.

Peru attempts to distinguish Honduras by arguing that here "[t]he sovereign act of capturing Montesinos [was] a condition precedent to the earning of the reward." (Br. Of Appellee at 8) On that basis it would have us conclude that the "sovereign act of capture was the 'nature' of the transaction." Id. at 7. Both the premise and the conclusion of Peru's argument are false.

The premise of the argument is false because the contract did not contain a condition precedent requiring Montesinos' capture. Article One of the emergency degree specifies that the reward "shall be given to the person or persons who provide(s) accurate information that will directly enable locating and capturing Vladimiro Lenin Montesinos Torres." (Compl. Ex. A) (emphasis added). Article Three specifies that accurate information shall be that "which enables locating and capturing Vladimiro Lenin Montesinos Torres." Id. (emphasis added) This condition describes the extent and quality of the information that an informant must provide to qualify for the reward. It does not require an actual capture. "Enable" means "to make able; give power, means, competence, or ability to; authorize" or "to make

possible or easy." Random House Unabridged Dictionary 639 (2d ed. 1983). Guevara satisfied the condition when he provided information sufficient to "make able" or "make possible" the capture of Montesinos. The information he provided enabled the capture when he provided it; it did not become enabling only after Peru took Montesinos into custody.

Although Peru issued the Emergency Decree in Spanish, we think that little has been lost in translation. Article One uses a conjugated form of the verb "permitir," which means "to permit" or "to allow." Harrap's Concise Spanish 383 (1991). Article Three uses "posibilitar," which means "to make possible" or "to facilitate." Id. at 397. Peru was not offering a reward in return for Montesinos' capture; it was offering a reward in return for information of sufficiently high quality to enable his capture. It is true that Article Seven provides that Peru "shall pay the Financial Reward 24 hours after the actual location and capture of . . . Montesinos." (Compl. Ex. A). While this clause could be read as a condition precedent requiring capture, it appears primarily intended to induce acceptance of the reward offer by promising timely payment.

Put another way, if Guevara had offered up every single bit of information Peru could possibly desire about how to locate and capture Montesinos, but Peru had a sudden change of heart and decided to let Montesinos remain free, we think that Guevara still would have satisfied his end of the bargain. Peru's own website describing the Emergency Decree best explains the document's terms: "The basic condition is to give true information to make possible the location and capture of Vladimiro Montesinos Torres." Id.

Guevara did that, and Peru used the information to capture Montesinos.

Even if the capture of Montesinos were a condition precedent, Peru's assertion that conditions necessarily (or even typically) alter the "nature" of a contract is mistaken. The core of a contract is the parties' performance obligations, what they bargained for. Conditions fix the timing of the parties' performance obligations or make them contingent. The occurrence of a condition may be beyond the parties' control, but that does not alter the nature of the contract. For example, an oil company might enter into a contract with a freight company to ship oil from Turkey to the United States conditioned on the oil company receiving an export license from the government of Turkey. Although the condition – the granting an export license – is a sovereign act, see MOL, Inc. v. Peoples Republic of Bangladesh, 736 F.2d 1326, 1328–29 (9th Cir. 1984), the contract is still one for the shipment of oil, which is quintessentially commercial.

The same principle applies if one of the parties is a sovereign state. Suppose that a country contracts to buy bullets from a private manufacturer. We know that transaction would be a commercial activity because the Supreme Court has said so. Weltover, 504 U.S. at 614, 112 S. Ct. at 2166 ("[A] contract to buy army boots or even bullets is a 'commercial' activity."). If the country conditioned the contract on it declaring war on a neighbor before the scheduled date of delivery, we would still have a commercial contract under which, if war is declared, the private party is obligated to supply bullets and the country would be obligated to pay for them. The condition precedent of a declaration of war speaks to the purpose or

motivation for buying the bullets, but it does not change the commercial nature of the acts of purchasing and paying for them. Enforcing the contract would not impinge on sovereignty, because it would not force the country to declare war or to refrain from doing so.

We think that information about a fugitive's whereabouts is to a war on crime as military supplies are to a more traditional war. Both commodities are useful to a state's performance of a sovereign function, but a contract for the purchase of either does not require the state to perform a sovereign function. In both situations performance of the contract by the private party enables the state to engage in a sovereign function if it wishes, but does not mandate that it do so. What it mandates is that the state pay the promised amount for the other party's performance. Paying an amount owed under a contract is not itself a sovereign act.

Conditions precedent stem from the motivation for a contract, rather than from its nature. Parties insert conditions precedent as insurance against frustration of purpose. If a general contractor only needs the services of a subcontractor if it wins the bid on a construction contract, it conditions the use of the subcontractor's services on the outcome of the bidding. Because Peru only wanted to pay for information about Montesinos sufficient to enable his capture, Peru framed its offer in those terms. Although capturing Montesinos may have been critically important to Peru and to its obligation under the contract, it is not critically important to our sovereign immunity analysis. The FSIA tells us that "[t]he commercial character of an activity shall be determined by

reference to the nature of the . . . act, rather than by reference to its purpose." 28 U.S.C. § 1603(d); see also Weltover, 504 U.S. at 614, 112 S. Ct. at 2166. If there is a condition precedent present here, it speaks to Peru's purpose, instead of to the nature of the contract.

Peru next contends that its offer of a reward cannot be "commercial" as that term is used in FSIA because there "is no marketplace in which private persons apprehend or capture individuals." (Br. Of Appellee at 9) In fact, there is. Not only that but the oldest American decision recognizing a commercial activities exception to sovereign immunity involved a reward for capture. In 1798 the District Court of South Carolina held that a ship flying under the flag of a foreign state could not claim sovereign immunity in a wage dispute where the wages it owed the seamen were paid as a reward for each ship captured, a fact that was "decisive of the commercial character" of the vessel. The Bellona, 8 F. Cas. at 559.

While the days of prize ships have passed, private individuals still can and do offer rewards for information leading to the capture of fugitives. For example, popular talk show host Oprah Winfrey recently offered up to $100,000 for information leading to the capture of fugitive child predators. See Oprah Winfrey Helps The FBI Get Its Man, Wash. Post, Oct. 8, 2005 at C7. Winfrey has already paid at least three such rewards. See Stella Foster, Stella's Column, Chi. Sun Times, Jan. 17, 2006, at 56. O.J. Simpson notoriously offered a reward for information leading to the arrest of his ex-wife's "real killers." See Paul Lieberman, Simpson Won't Get Police Help in Search for Killer, L.A. Times, Oct. 5, 1995, at A1. And, of course, private bail-bonding companies frequently offer

rewards for information leading to the capture of bail jumpers. The question is whether Peru's offer of a reward for information is the kind of thing that private parties do. The answer is that Oprah did it, O.J. did it, and bail bondsmen do it regularly.

Concerned about the effect of the bail bondsmen analogy on its position, Peru argues that "[w]hen a bailbondsman physically apprehends an individual, the bondsman does so as subrogee of the sovereign's authority." (Br. of Appellee at 11). Peru's point, apparently, is that when a bondsman arrests a fugitive he is acting as an agent of the sovereign. That argument does not help Peru much, if at all. If a bail bondsman offered a reward for information enabling the location and capture of a fugitive who had skipped out on a bond, he could not successfully defend a lawsuit seeking to collect on the reward by asserting sovereign immunity. If an agent acting for the sovereign could not successfully claim sovereign immunity, the sovereign could not either.

That Peru's offer of a reward for information enabling the capture of a fugitive is the kind of thing that private parties do becomes even more obvious when we properly characterize the market at a higher level of generality. In Weltover, the Supreme Court broadly characterized a contract for the purchase of bullets as a "sales contract[]." 504 U.S. at 614, 112 S. Ct. at 2166. In Honduras, we characterized the contract as one designed "to provide goods and services." 129 F.3d at 548. What we have here is a contract to purchase information, and in our information age such contracts are a common staple of the private sector. Peru's attempt to lower the level of generality from a contract for the sale of information

down to one of reward for information leading to the capture of a fugitive focuses on the purpose instead of the nature of the transaction.

Contracts for the purchase of information are ubiquitous in the marketplace. Marketing companies offer college students a few dollars, or a product worth that much, for completing surveys. Nonprofit groups pay market research firms for each name added to a targeted mailing list. Apartment complexes and fitness clubs offer referral bonuses for those who provide the names of friends and associates who may be looking for a place to live. A plethora of internet sites offer for sale information about the arrest record, litigation history, and location of everyone with a name and some kind of number to go with it. (Think LexisNexis.) Credit reporting agencies sell tens of millions of dollars of information about consumers and businesses to other businesses each year. There is nothing sovereign about buying and selling information.

Finally, Peru contends that even if a private individual can engage in an activity, it does not mean that the activity is commercial. It accuses Guevera of "equat[ing] private activity with commercial activity," (Br. of Appellee at 11), but this equation is hardly novel. Several centuries of case law, the Tate Letter, and the legislative history of the FSIA also use those terms interchangeably. Still, the term codified in the act is "commercial activity," and we agree with Peru that there is a realm of private activity that cannot fairly fall within any meaning of the word "commercial." But we do not agree with Peru's proposal about how we should stake off that realm.

Peru proposes that "commercial activity" includes only that which is "done for a profit motive." Id. at 12. We decline to adopt that test because the Supreme Court has instructed us that the FSIA "unmistakably commands" that we consider the nature, rather than the purpose, of a transaction, Weltover, 504 U.S. at 617, 112 Ct. at 2167, and a "motive" test treads too closely to an examination of "purpose."

Peru points out that while the text of the Act prohibits an inquiry into the government's actual motive for a particular act, it does not forbid us from imagining why a private person might engage in similar conduct. We could, Peru says, imagine that a hypothetical private party was performing an identical activity as the government and then inquire into whether that hypothetical party had a profit motive. We see no reason to do so, because this type of inquiry is not supported by the text of FSIA or by precedent. It would be inconsistent with the language of the Act and the Supreme Court's instruction that motive not be considered. It is also unnecessary, because the Weltover test already screens out non-commercial acts.

While the FSIA does not state that all commercial activities must have a profit motive, the legislative history of the Act does establish that all activities carried on for a profit are commercial. H.R. Rep. No. 94-1487, at 16 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6615. But saying that for-profit activities are commercial is not the same thing as saying that all commercial activities are for profit. The premise that all A is B does not logically compel the conclusion that all B is A, unless A and B are the same thing. There is no reason in the FSIA to believe that commercial activity means the same thing, and no more than,

for-profit activity. Some activities that are not carried on for a profit may nonetheless constitute commercial acts. As the House Report explains:

> Certainly, if an activity is customarily carried on for profit, its commercial nature could readily be assumed. At the other end of the spectrum, a single contract, if of the same character as a contract which might be made by a private person, could constitute a "particular transaction or act."

Id. Reducing the meaning of commercial activity to that motivated for profit excludes what the House Report referred to as "the other end of the spectrum," contracts "of the same character as a contract which might be made by a private person," even if not made for profit. Id.

Adopting Peru's position that an activity is not commercial unless it is for profit would also conflict with the Weltover decision. That decision establishes that a government contract to buy bullets is commercial, even though most private individuals do not buy bullets for profit. See 504 U.S. at 617. In fact, when private individuals purchase goods and services, they rarely do so with the intent to profit from their purchase. (Think of consumers at grocery stores and gas stations.) Peru's test would exclude most cases in which the government acts as a purchaser, rather than a vendor, of goods and services because most purchases made by private persons are not made with the intent to resell for profit. Nothing in the restrictive theory of sovereign immunity turns on whether the government is a buyer or a seller. Instead, the critical distinction is whether the government is acting in its

capacity as sovereign or if it is acting as any private individual might act.

We think that the Weltover test already provides an effective mechanism for filtering out private yet non-commercial activities. The test applies to suits "based upon a foreign state's participation in the marketplace in the manner of a private citizen." Weltover, 504 U.S. at 614, 112 S. Ct. at 2166 (emphasis added). It distinguishes between cases where a foreign government acts "as regulator of a market," which are not within the exception to sovereign immunity, and those where it acts "in the manner of a private player within" that market, which are. Id. When it issued the offer contained in the Emergency Decree, Peru entered the marketplace of information. It did so not as a regulator but as a purchaser in the manner available to any private individual, and that makes its actions commercial.

Although our decision is not based on policy grounds, we think it worth noting that this is an instance in which the result the law requires coincides with good policy. Accepting Peru's position, dressed though it is in the clothing of sovereignty, would frustrate rather than further the ability of countries to carry out their sovereign functions. Anything that makes it easier for countries to welch on their promises to pay for information decreases the real value of any reward they offer and makes it less likely that an offer will be accepted. As Guevara has learned up to this point in the litigation, the promise of a multimillion dollar reward means little or nothing to an informant if the country offering the reward cannot be made to pay it. The holding Peru asks us to reach would jeopardize not only its vital interests but those

of every country that offers rewards for information, including this country.

The United States has a number of statutes that authorize the executive branch to offer rewards for information useful in combating terrorism, espionage, international narcotics trafficking, violations of international humanitarian law, and other criminal acts. See, e.g., 18 U.S.C. §§ 3071–77 (authorizing the Attorney General to offer rewards for information leading to the arrest of individuals engaged in terrorism or espionage); 22 U.S.C. § 2708 (granting the Secretary of State discretion to pay rewards for information leading to the arrest of individuals engaged in international terrorism or narcotics-related offenses); Pub. L. No. 105-323, 112 Stat. 3029, 3032 (amending 22 U.S.C. § 2708 to extend it to cover serious violations of international humanitarian law relating to the former Yugoslavia); Pub. L. No. 106-277, 114 Stat. 813 (extending Pub. L. No. 105-323 to cover serious international humanitarian crimes in Rwanda); Pub. L. No. 108-106, 117 Stat. 1209, 1223 (authorizing rewards for information concerning an indictee of the Special Court for Sierra Leone). These reward programs have been successful. Under them the government has paid out at least $47 million since September 11, 2001. Kevin Whitelaw, Just a Phone Call Away, U.S. News & World Rep., Jan. 31, 2005, at 23. Success stories include the location and capture (killing) of Saddam Hussein's sons, Uday and Quasay Hussein, and the capture of Ramzi Yousef, one of the 1993 World Trade Center bombers. Id.

The FBI and CIA used a reward offer to nab one of the most nefarious spies in this country's history. For as long as three decades, a mole high in the American

intelligence community, code-named "Graysuit," passed on to the KGB some of this country's most closely held secrets. Louis J. Freeh, My FBI 237 (2005). A "huge team of CIA and FBI officers and agents" worked to uncover the traitor's identity but without success. Id. Finally, Louis Freeh, the Director of the FBI and George Tenet, the Director of Central Intelligence, came up with a plan to offer a "seven-figure payment" for his identity. Id. at 238. The reward offer was aimed at retired senior KGB intelligence officials. Id. One of them accepted the offer. Id. at 239. In return for "several million dollars plus other considerations" he turned over to the CIA and FBI a box full of files and information on Graysuit, which he somehow managed to smuggle out of Lubyanka, the infamous KGB headquarters. Id. With that critical information Graysuit was identified as a highly placed FBI agent named Bob Hanssen. Id. at 240. He was arrested, convicted, and sentenced to life imprisonment. Michael Killian, FBI Spy Hanssen Gets Life, Apologizes, Chi. Trib., May 12, 2002, at 1.

Had the KGB agent who accepted the reward offer in the Hanssen case had reason to doubt whether the United States would pay as promised, he would not have risked his life to provide the information that he did, information that was vital to this country's national security interests. The same is true of those who provided the information that enabled United States to corner Uday and Quasay Hussein and to capture Ramzi Yousef. None of the statutes that authorize the United States government to offer and pay rewards contains a waiver of sovereign immunity, but reward offers are only as effective as they are enforceable. Enforceable commitments are important to reward programs, which are in turn important to

the sovereign interests of this and other countries. Absent a clear requirement in the FSIA, we will not create impediments to the enforcement of reward contracts entered into by this or any other country.

IV.

Guevara contends that the district court erred in finding that Vidal and Rospigliosi, the individual defendants, acted within the scope of their authority as officials of Peru in offering the reward. The FSIA does not expressly provide immunity to individuals acting on behalf of a foreign state. Nonetheless, several circuits have found that such immunity extends to state officials acting in their official capacity. See, e.g., Velasco v. Gov't of Indonesia, 370 F.3d 392, 398 (4th Cir. 2004); Keller v. Cent. Bank of Nig., 277 F.3d 811, 815 (6th Cir. 2002); El-Fadl v. Cent. Bank of Jordan, 75 F.3d 668, 671 (D.C. Cir. 1996); Chuidian v. Phil. Nat'l Bank, 912 F.2d 1095, 1103 (9th Cir. 1990). However this right is derivative; courts provide individual immunity because "[t]he rule that foreign states can be sued only pursuant to the specific provisions of sections 1605–07 would be vitiated if litigants could avoid immunity simply by recasting the form of their pleadings." Chuidian, 912 F.2d at 1102. That logic does not apply where the sovereign itself is not entitled to immunity. There is no present need to review the district court's conclusion that the individual defendants were acting within the scope of their authority. Even if they were, they are not entitled to sovereign immunity because the sovereign itself is not.

The individual defendants contend that we ought to affirm the judgment dismissing them from the lawsuit

anyway, on the ground that the district court lacked personal jurisdiction over them. The district court, having found that they were entitled to sovereign immunity, dismissed their challenge to personal jurisdiction as moot. That result followed from the district court's conclusion that the defendants were immune under the FSIA, which limits the subject matter jurisdiction of the federal courts. 28 U.S.C. § 1604 (stating that if the Act applies, "a foreign state shall be immune from the jurisdiction of the courts of the United States"). "[A] court should inquire into whether it has subject matter jurisdiction at the earliest possible stage in the proceedings." Univ. of S. Ala. v. Am. Tobacco Co., 168 F.3d 405, 410 (11th Cir. 1999). If the court finds that it does not have subject matter jurisdiction, "the court's sole remaining act is to dismiss the case for lack of jurisdiction." Morrison v. Allstate Indem. Co., 228 F.3d 1255, 1261 (11th Cir. 2000).

Because we disagree with the district court that the FSIA bars Guevara's suit, the individual defendants' motion to dismiss for lack of personal jurisdiction is again relevant. However, the district court should have the first opportunity to resolve it. Defendants cite SEC v. Chenery Corp., 318 U.S. 80, 88, 63 S. Ct. 454, 459 (1943), for the proposition that we must affirm the decision of a district court if it reached the correct result but for the wrong reason. The Chenery case notes that this rule does not apply "where the correctness of the lower court's decision depends upon a determination of fact." Id. Our own decisions are to the same effect. See Pacheco de Perez v. AT&T Co., 139 F.3d 1368, 1372 n.5 (11th Cir. 1998) ("We are mindful of the general rule that a court of appeals will not consider issues not reached by the district court,

especially where the issues involve questions of fact."); Stewart v. Dep't of Health and Human Servs., 26 F.3d 115, 115–16 (11th Cir. 1994) (same). The "minimum contacts" prong of the personal jurisdiction inquiry is necessarily case and fact specific. We decline to take up that issue without the benefit of factfindings from the district court. Vidal and Rospigliosi may reassert on remand the issue of the district court's jurisdiction over their persons.

REVERSED and REMANDED.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 04-23223-Civ-COOKE/BANDSTRA

[Filed July 27, 2010]

JOSE GUEVARA,	)
	)
Plaintiff	)
	)
vs.	)
	)
REPUBLIC OF PERU, *et al.*,	)
	)
Defendants.	)
	)

ORDER DISMISSING CASE WITHOUT PREJUDICE

This matter is before me on remand from the Eleventh Circuit Court of Appeals. When this case initially came before me, I granted Peru's motion to dismiss, finding that the court lacked subject matter jurisdiction because Peru was immune from suit under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 ("FSIA"). [ECF No. 31]. Upon Guevara's appeal, the Eleventh Circuit held that the FSIA did not bar his lawsuit. My judgment was vacated and the case was remanded for further proceedings. On

remand, the parties engaged in discovery and Guevara filed a motion for summary judgment, which I granted. Peru appealed, reiterating its initial argument that the court lacked subject matter jurisdiction. The Eleventh Circuit agreed that Peru was not subject to this court's subject matter jurisdiction and remanded the case with the instruction that I dismiss the case, without prejudice. Accordingly, Plaintiff's Complaint is hereby **DISMISSED WITHOUT PREJUDICE**.

DONE AND ORDERED in Chambers, Miami, Florida this 27th day of July 2010.

/s/ Marcia G. Cooke
MARCIA G. COOKE
United States District Judge

cc:

The Honorable Ted E. Bandstra

All counsel of record

APPENDIX E

SECRETO

[seal] *U.S. Department of Justice*

Federal Bureau of Investigation

Office of the Legal Attache
United States Embassy
Lima, Peru

29 October 2001

His Excellence
Fernando Rospigliosi
Minister of Interior
Lima, Peru

Dear Minister,

Please allow me to express my sincere congratulations on your appointment as Minister. My colleagues in Miami and I enjoyed a fruitful working relationship with your predecessor, Antonio Ketin Vidal. We all look forward to continuing this cooperative relationship with you.

In response to your letter dated September 10, 2001, I would like briefly explain the FBI position regarding Mr. Jose Guevara. Working with our FBI

office in Miami, Mr. Guevara provided the key information that let to the location and capture of fugitive Vladimiro Montesinos. Most importantly, Mr. Guevara's decision to provide this information was influenced by the personal assurance of former Minister Vidal, communicated via the FBI, that the Government of Peru would favorably consider him for a significant portion of the $5 million reward offered for Montesinos' capture.

Naturally, the FBI will leave it to the government of Peru to assess the specific dollar value of Mr. Guevara's successful cooperation. Nonetheless, we respectfully request that this process be expedited as Mr. Guevara's health is poor and he is encumbered with many pressing financial obligations.

Sincerely,

/s/ Kevin W. Currier

Kevin W. Currier
Legal Attache

APPENDIX F

SECRETO

[seal] *U.S. Department of Justice*

Federal Bureau of Investigation

Office of the Legal Attache
Avenida Andrés Bello 2800
Santiago, Chile

30 October 2002

His Excellence
Gino Costa
Minister of Interior
Lima, Peru

Dear Minister,

In response to recent inquiries from your office with regard to the reward offered by the Government of Peru for the capture of Vladimiro Montesinos, I have attached a copy of the October 29, 2001, letter I forwarded to your predecessor, Fernando Respigliosi. This letter contains the FBI's official response relating to the reward. I am aware that in November 2001, you telephonically spoke with Miami FBI Special Agent Waldo Longo to discuss this matter in greater detail, as have others from your office as recent as September

2002. The enclosed letter and the comments made by Agent Longo reflect Mr Jose Guevara's key contributions which led to the location and capture of Montesinos.

Thank you again for your attention in this matter.

Sincerely,

/s/ Kevin W. Currier

Kevin W. Currier
Legal Attache